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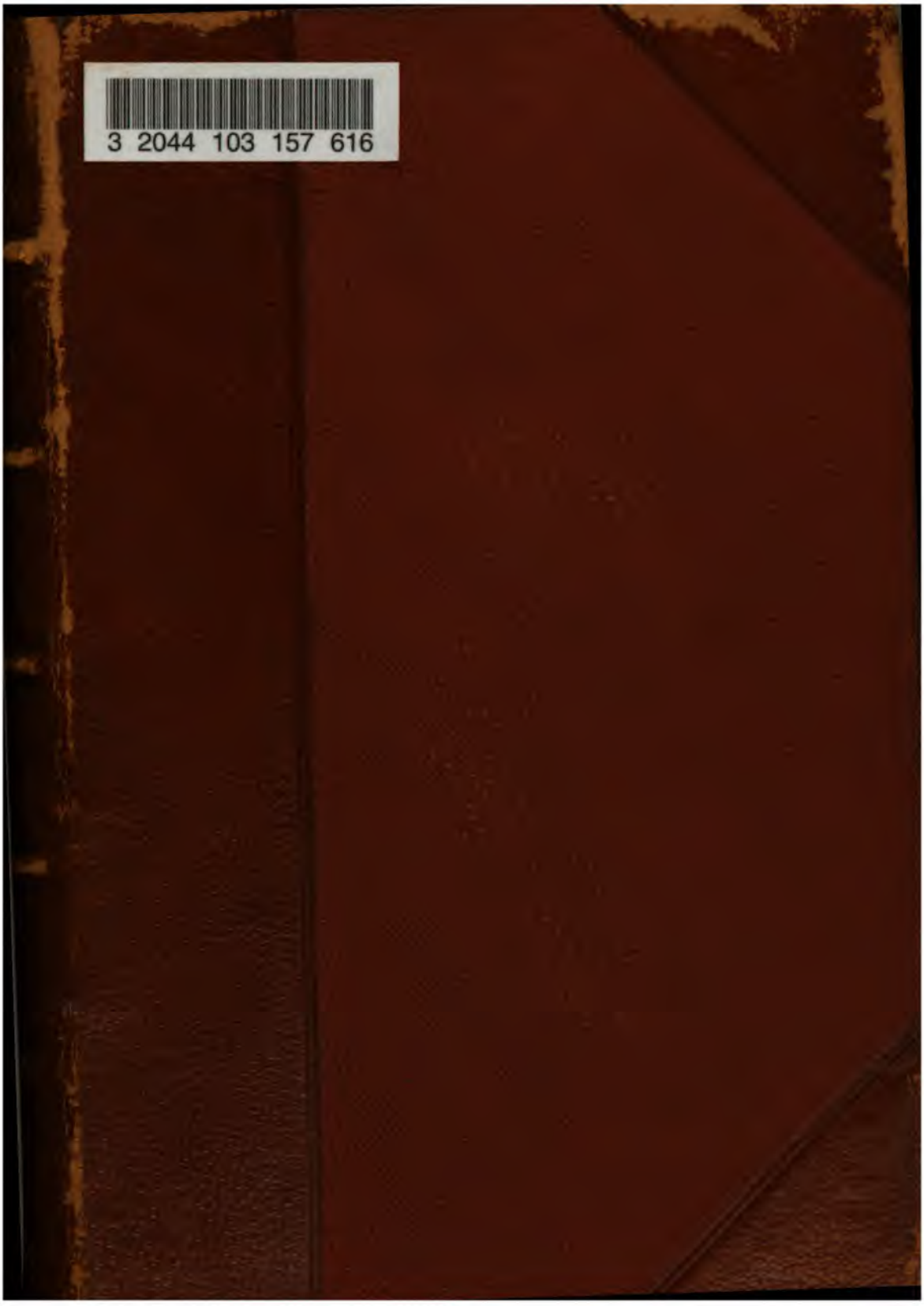
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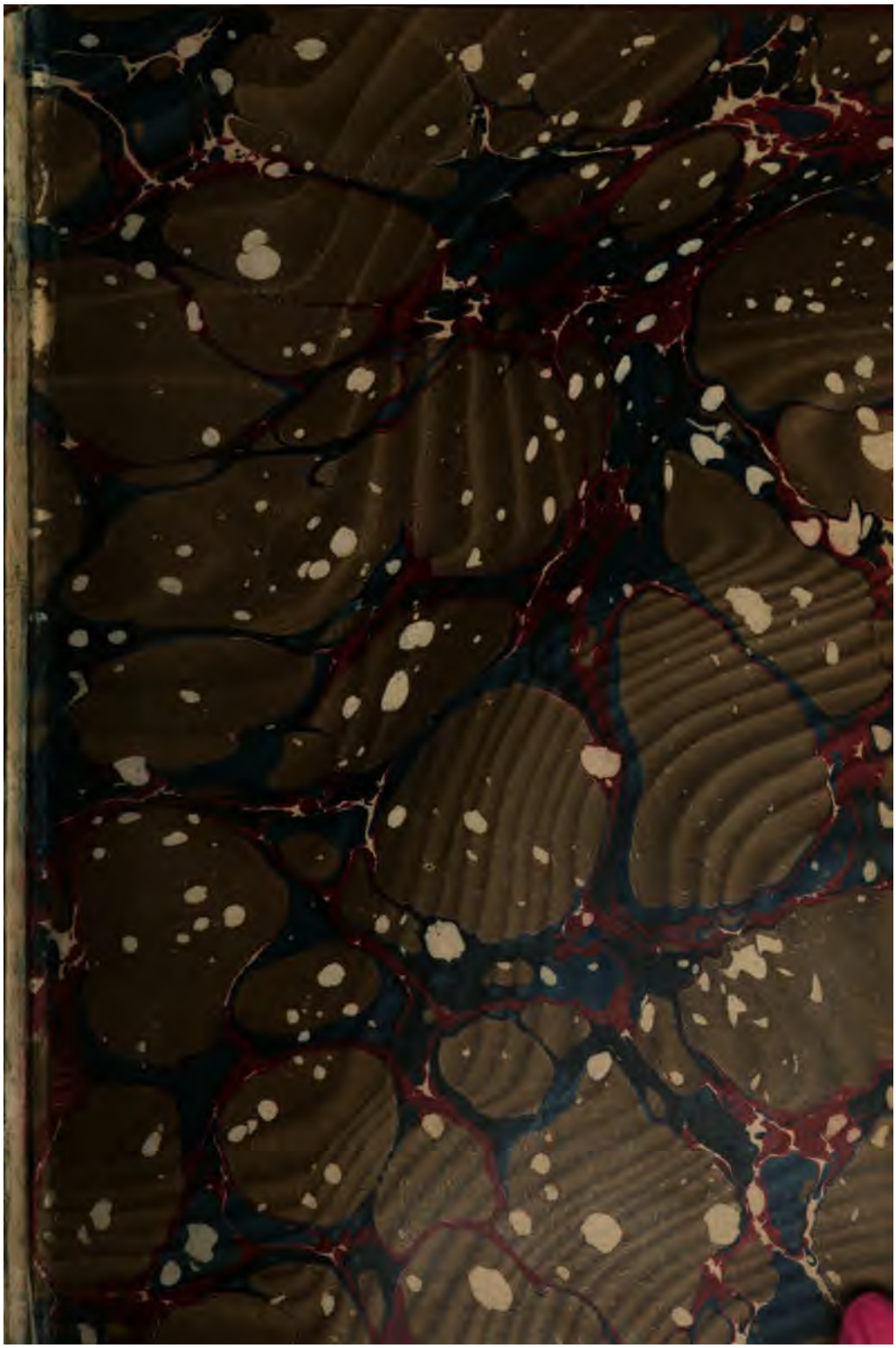

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HALLECK'S

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HALLECK'S

INTERNATIONAL LAW

OR

RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR

THIRD EDITION

THOROUGHLY REVISED AND IN MANY PARTS REWRITTEN

BY SIR SHERSTON BAKER, BART.

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VOL. II.

LONDON

KEGAN PAUL, TRENCH, TRÜBNER, & CO. LTD.

PATERNOSTER HOUSE, CHARING CROSS ROAD

1893

Rec. Dec. 22, 1898.

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Difference between public and private enemies

§ 1. IT has already been stated that a war, duly commenced and ratified, is not confined to the Governments or authorities of the belligerent State, but that it makes all the subjects of the one State the legal enemies of each and every subject of the other. This hostile character results from political ties, and not from personal feelings or personal antipathies; their *status* is that of legal hostility, and not of personal enmity. So long as these political ties continue, or so long as the individual continues to be the citizen or subject of one of the belligerent States, just so long does he continue in legal hostility towards all the citizens and subjects of the opposing belligerent; such are public enemies, whatever may be their occupation, and in whatever country they may be found. The Romans had a particular term (*Hostis*) to denote a public enemy, and to distinguish him from a private enemy, whom they called *Inimicus*. The distinction is a marked one, and should never be lost sight of. Private enemies have

hatred and rancour in their hearts, and seek to do each other personal injury. Not so with public enemies. They do not, as individuals, seek to do each other personal harm. And even where brought into actual conflict, as armed belligerents, there is usually no personal enmity between the individuals of the contending forces. So far from this, when peace is declared, the military forces of the opposing belligerents are usually personal friends, and vie with each other in politeness and mutual kindness.

Status of legal hostility

§ 2. Moreover, there is a limit to public enmity. The law of nature gives to a belligerent nation the right to use such force as may be necessary, in order to obtain the object for which the war was undertaken. Beyond this, the use of force is unlawful; this necessity forms the limit of hostility between subjects of the belligerent States. They, therefore, have no right to take the lives of non-combatants, or of such public enemies as they can subdue by other means, nor to inflict any injuries upon them or their property, unless the same should be necessary for the object of the war.[1]

Difference of treatment

§ 3. We have already stated the general effect of a declaration of war upon the persons and property of the subjects of an enemy found within our own territory, and, that while, by the strict rights of war, we can retain them all as prisoners or prizes, this right, by modern usage, is only applied to the military and to ships of war, mere residents, merchants, and merchant vessels being allowed a certain time to withdraw themselves from our jurisdiction without molestation. Subjects of a neutral State, resident or domiciled in the enemy's country, are, in many respects, to be regarded as enemies; but, as they are not liable to military duty, in the proper sense of that term, they cannot be treated either as actual combatants or as enemy's subjects, who are liable to be called upon by their own State to oppose us by force. Moreover, our own subjects, resident or domiciled in the enemy's country, are, in certain matters relating to trade and the rights of maritime capture, regarded as legal enemies, but not with

[1] Vattel, *Droit des Gens*, liv. iii. ch. viii. § 138; Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 2; Rutherforth, *Institutes*, b. ii. ch. ix. § 15; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. vi.; Cornu *v.* Blackburne, *Doug. Rep.*, p. 644; Massé, *Droit Commercial*, liv. ii. tit. i. ch. ii.; De Félice, *Droit de la Nat.*, &c., tome ii. lec. xxv.; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xii.

respect to their personal *status* and personal duties. Again, as belligerents are not permitted to use force against each other within neutral territory, we cannot exercise there the same rights against the person and property of an enemy as we can within our own or enemy's territory, or upon the high seas. The treatment of an enemy, therefore, depends in a measure upon the place in which he may be found.[1]

Allies not necessarily associates in a war

§ 4. It has already been remarked, that we have the same rights of war against the co-allies or associates of an enemy as against the principal belligerent. It must, however, be observed that general allies are not necessarily associates in a war. The allies of our enemy, therefore, may, or may not, themselves become our enemies, according to the character of the alliance which they have formed with that enemy, the time of making it, and the circumstances under which it was entered into. We must, therefore, distinguish between the general allies of an enemy and his associates in a war.[2]

If an ally of the enemy engage in hostilities

§ 5. But the question here arises, how are we to know whether an enemy's ally is himself to be regarded as an enemy, and to be treated in the same manner as the principal belligerent? In the first place, if he has made common cause with our enemy in beginning or carrying on hostilities against us, we have toward him the same belligerent rights as toward the principal in the war, for both are equally our enemies. There is no need of proving him an enemy, for his own conduct has made him such. Again, even where there are no obligations of treaty, if he freely and voluntarily declares in favour of his ally and against us, he, of his own accord, becomes our enemy, and is to be treated in every respect as the principal. But the simple fact of there being an alliance between our enemy and other nations would not justify us in treating such nations as belligerents.[3]

Warlike alliance made during a war

§ 6. Alliances, for warlike purposes, are divided into two classes, *offensive* and *defensive*. In the former, the State unites with its ally for the purpose of jointly waging war against a third party; but in the latter, the State engages to defend its

[1] Burlamaqui, *Droit de la Nat.*, &c., tome v. pt. iv. ch. vi.; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. ch. viii.; Ragnenal, *Droit de la Nat.*, &c., liv. iii. ch. v. § 4; Bello, *Derecho Internacional*, pt. ii. cap. ii. § 2.

[2] Heffter, *Droit International*, §§ 115–7; Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. §§ 13, 14.

[3] Vattel, *Droit des Gens*, liv. iii. ch. vi. §§ 96–8.

ally in case of an attack. Some alliances are both offensive and defensive; others are only defensive; but there is seldom an offensive alliance which is not also a defensive one. Some are against all opponents, and without restriction; while others are only against a particular State, and on specified conditions, with limitations and exceptions. Warlike alliances, made at the commencement of, or during a war, are necessarily binding, for the contracting parties then know the character of the war and the exact nature of the obligations which they have assumed. Alliances, made under such circumstances, are acts of hostility which make the ally an enemy equally with the principal belligerent. It is important, however, to satisfy ourselves as to the character of such alliances, to see whether or not they are really *warlike* compacts which make the contracting parties also parties to the war. The alliance between France and the English revolted colonies in North America, being made during the war of the American revolution, was very properly regarded by Great Britain as tantamount to a declaration of war on the part of France, and as justifying immediate hostilities against this ally of the revolted colonies.[1]

Warlike alliance made before a war

§ 7. A warlike alliance made by a third party before the war with a State, then our friend, but now our enemy, will not, as a general rule, be, of itself, a sufficient cause for commencing hostilities against such third party; for there may be good reason why he should not regard himself as bound by the obligations of the alliance. It would certainly be very impolitic, as well as improper, for us to treat as a belligerent one who may not be disposed to become our enemy. The character of the alliance, and the peculiar circumstances of the case, must serve as guides for our conduct, always keeping in mind the maxim, that it is better to have a friend than an enemy, and the rule of international law, that we are justifiable in engaging in hostilities only so far as may be necessary for our own security and the protection of our just rights. In case of alliances, made before the war, the question is, to determine whether the actual circumstances are such as were contemplated in the engagement—whether they are such as were expressly specified, or tacitly supposed, in the treaty.

[1] Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xi.; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. ix.; Phillimore, *On Int. Law*, vol. iii. § 73.

This is what the civilians call *casus fœderis*, or the case of the alliance. Whatever has been promised, either expressly or tacitly, in the treaty, is due in the *casus fœderis*. But if not so promised, it is not due. If the war is not such a case as the treaty contemplated, the ally does not become a party to it; for the *casus fœderis* does not take place.[1] In 1826 the Princess Regent of Portugal required the assistance of Great Britain against Spain, by virtue of the tripartite treaty of 1703 between England, Portugal, and Holland; Mr. Canning argued in the House of Commons that it was necessary to show that a *casus fœderis* had arisen, although the existence of the treaty was not denied.

An offensive alliance

§ 8. In an *offensive* alliance, made before the war, the ally engages generally to co-operate in hostilities against a specified power, or against any power with whom the other party may declare war. Where an alliance is made in general terms, and one of the two parties to it declares war against its enemy, even though that enemy be the very nation against which the alliance was formed, the other ally is allowed time to examine into the causes of the war; if it be a just war, all his engagements come into force; but if it be unjustly declared, his treaty obligations cease to be binding.[2]

A defensive alliance

§ 9. So, also, in a *defensive* alliance made before the war, the *casus fœderis* does not take place immediately on one of the parties being attacked by an enemy. The other contracting party has the right, as indeed it is his duty, to ascertain if his ally has not given the enemy just cause of war, for no one is bound to undertake the defence of an ally, in order to enable him to insult others, or to refuse them justice. If he is manifestly in the wrong, his co-ally may require him to offer reasonable satisfaction; and if the enemy refuse to accept it, and insists upon a continuance of the war, the co-ally is then bound to assist in his defence. But without such offer of reasonable satisfaction, the war continues to be aggressive in character, and therefore unjust, and the ally may properly refuse to render the promised assistance, for the tacit condition on which such assistance was stipulated to be given has

[1] Vattel, *Droit des Gens*, liv. iii. ch. vi. § 88; Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. § 15; Martens, *Précis du Droit des Gens*, § 299; Moser, *Versuch*, &c., b. ix. pt. i. p. 24; Garden, *De la Diplomatie*, liv. vi. § 2, and liv. vii. § 1.

[2] Bello, *Derecho Internacional*, pt. ii. ch. ix. § 1.

not been observed, or, in other words, the *casus fœderis* has not taken place.

Remarks on character and effect of such alliances

§ 10. If, on the contrary, a party to the defensive alliance, could call upon his ally to assist him whenever he was assailed, and without regard to the justice of the war, or the circumstances of the attack, there would be no difference between a defensive and an offensive alliance, for many wars which are defensive in their *operations* are essentially offensive in their *character* and *principles*. Where attack is the best mode of providing for the defence of a State, the war is defensive in principle, though the operations are offensive. Where the war is unnecessary to safety, its *offensive* character is not altered, because the wrong-doer is reduced to *defensive* warfare. So, a State, against which a dangerous wrong is manifestly meditated, may prevent it by striking the first blow, without thereby waging a war in its principle offensive. Accordingly, it is not every attack made on a State that will entitle it to aid under a defensive alliance; for if that State had given just cause of war to the invader, the war would not be, on its part, defensive in principle.[1]

Obligation of an alliance determined by justness of the war

§ 11. Admitting the principle that every treaty of alliance contains the tacit clause that it shall not be binding, except in case of a just war, and that the co-ally has a right to decide for himself upon the character of the war, and whether or not the *casus fœderis* has taken place, it is only in case the war is *clearly* and *obviously* unjust that he can claim a release from the obligations which he voluntarily contracted. Whether the alliance be offensive or defensive, or both, unless the ally upon examination find the war *manifestly* unjust, he must comply with his engagements; and in the absence of any proof to the contrary, he is bound to consider that his co-ally has just cause of war. In speaking of the tacit restriction, which is necessarily understood in every treaty of alliance, Wheaton remarks that it 'can be applied only to a manifest case of unjust aggression on the part of the other contracting party, and cannot be used as a pretext to elude the performance of a positive and unequivocal engagement, without justly exposing the ally to the imputation of bad faith. In doubtful

[1] Wildman, *Int. Law*, vol. ii. p. 166; Grotius, *De Jure Bell. ac Pac.*, lib. ii. cap. xv. § 13; Garden, *De la Diplomatie*, liv. vi. sec. ii. § 2; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. iii.

cases, the presumption ought rather to be in favour of our confederate, and of the justice of his quarrel.' [1]

Distinction between auxiliaries and subsidy

§ 12. In a treaty of succour, the ally stipulates to furnish certain assistance in troops, ships of war, provisions, or money. If the succour is to consist of troops, they are called *auxiliaries*; if of money, it is called *subsidy*. The rules already laid down, with respect to the *casus fœderis* in treaties of alliance made before the war, apply equally to treaties of limited succour and subsidy. Such treaties are not binding where the war is manifestly unjust.

Treaty of guarantee

§ 13. Vattel says that if the State which has promised succour finds itself unable to furnish it, this inability alone is sufficient to dispense with the obligation. If, for example, one of the allies is engaged in another war, not contemplated by the alliance, and which requires his whole strength, he is absolved from sending assistance to his ally in the war to which he is not yet a party. Again, if he has promised provisions, and his own subjects are suffering from famine, the *casus fœderis* does not take effect; for he is not obliged to give another what is absolutely necessary for the use of his own people.[2] It seems to us that a promise is none the less binding because of the inability of the promiser to fulfil his engagements.

Example of Switzerland

§ 14. It is also proper to remark that even where the *casus fœderis* is admitted to take place, and the stipulated succours are furnished, the ally who furnishes them is not necessarily made a party to the war. Where one State stipulates to furnish to another a limited succour of troops, ships of war, money, or provisions, without any promise looking to an eventual engagement in general hostilities, such a treaty does not necessarily render the party furnishing this limited succour the enemy of the opposite belligerent. It only becomes such, so far as respects the auxiliary forces thus supplied; in all other respects it remains neutral. Such, for example, formerly were the accustomed relations of the confederated cantons of Switzerland with the other European powers.[3] A

[1] Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. § 15; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. ix.

[2] Vattel, *Droit des Gens*, liv. iii. ch. vi. §§ 81, 92; De Félice, *Droit de la Nat. et des Gens*, tome ii. lec. 28.

[3] Vattel, liv. iii. ch. vi. §§ 79, 82; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xii.; Bello, *Derecho Internacional*, pt. ii. cap. ix. § 1.

treaty expires if one of the contracting parties should lose its existence, as was the case in the dissolution of Poland in 1795.

Capitulations for mercenaries

§ 15. A distinction, however, must be made between simple *treaties of succour and subsidy*, and *capitulations* for mercenaries, like those formerly entered into by the Swiss.[1] Auxiliary troops are usually under the general control and direction of the power which furnishes them, and which is, therefore, in a measure, responsible for their acts. But mercenaries, furnished under capitulations, usually engage in a foreign service for a stated period, and for stipulated pay and allowances, being entirely at the disposition of the power which employs them, that which furnishes them having no part in the conquests which are made, or in the negotiations and treaties which are entered into.[2]

Limited assistance rendered to an enemy

§ 16. Is a limited assistance rendered to the enemy, under the obligations of a subsidy-treaty, a just cause of war? If the ally of our enemy goes no further than to furnish the stipulated succour, and, in other respects, preserves toward us the accustomed relations of friendship and neutrality, we may overlook this cause of complaint. This prudent caution of avoiding an open rupture with those who render to our

[1] In 1859, the Federal Government passed a law—(1) forbidding any Swiss citizen to enrol himself, as soldier to a foreign State, without the permission of the Government of his Canton, (2) enacting severe penalties against whosoever might seek to recruit, (3) forbidding any Swiss citizen to take service in a foreign country, in a corps, not making part of the national army, of that State for which he was enrolled, (4) forbidding any Swiss citizen to engage himself to form a corps composed in whole, or in part, of Swiss citizens, for any State; and, on the other hand, prohibiting foreigners to enrol Swiss citizens, or to assist therein.

The Neapolitan Government had some regiments, composed entirely of Swiss soldiers, by virtue of a capitulation, which ended June 15, 1859. In that year a mutiny broke out among these troops; 300 were shot down by the Neapolitan soldiers, and the remainder were sent back to Switzerland. This occurrence, together with some questions which arose the same year, concerning the employment of Swiss soldiers in foreign States, and especially in Italy, was the immediate cause of the passing of the above-mentioned law. Swiss troops were, and still are, in the Papal service, but without any capitulation; they were also in France in the days of the Bourbons. Moors and Heyducks were employed in many of the former German courts. The Greek emperors had Varangians. The Sultans of Morocco still depend on negroes or 'blackguards.'

[2] Martens, *Précis du Droit des Gens*, §§ 301–3; Galiani, *Dei Doveri dei Prin.*, &c., lib. i. cap. v. p. 145; Moser, *Versuch*, &c., b. x. pt. i. pp. 139, 140; Romainmatier, *Histoire Militaire des Suisses*, passim; Garden, *De la Diplomatie*, liv. vi. sec. ii. § 2.

enemy certain limited assistance, previously stipulated for, has gradually introduced the custom of not regarding it as an act of hostility, especially where it is of a limited character. But, if prudence dissuades us from making use of a right, it does not thereby destroy the right itself. A cautious belligerent may choose to overlook certain offences, rather than unnecessarily increase the number of its enemies, and be influenced by considerations of expediency, in not enforcing the strict rights of war. It is, therefore, a question of policy, whether the assistance furnished an enemy shall be regarded as good and sufficient cause for declaring war against the ally who furnishes it.[1]

Defence of the thing guaranteed

§ 17. We have described, in chapter viii., the general character of treaties of guarantee and surety, as distinguished from ordinary treaties of alliance. The question to be considered here is, how far such treaties bind the party making the guarantee to assist the other party in a war for the defence or the security of the thing guaranteed? For example, Great Britain, by the treaties of 1642, 1654, 1661, 1703, 1807, 1810, and 1815, with Portugal, guaranteed the latter kingdom to the lawful heir of the house of Braganza, and agreed to defend it 'against every hostile attack.' In the case of a war between Portugal and a third power, in which the former was subjected to 'a hostile attack,' was Great Britain bound to join in the war, without regard to its justice or injustice? Some publicists have laid down the general rule, that where one of the allies has guaranteed to the other certain specified rights or possessions, which are taken away or seized by a third power, this third power places itself in a position of hostility towards both of the contracting parties. In this case, it is said, the guaranteeing party cannot refuse to succour his ally. Here his duty is plain and indisputable, and if he should refuse to take part in the war, he is justly chargeable with a breach of the alliance. The *casus fœderis* takes place, it is said, as soon as the rights or possessions so guaranteed are seized or encroached upon. The agreement, being for the security of a specific right, or the possession of a particular territory, it is special, and the covenant cannot be evaded or avoided by any general plea of the injustice of the war.

[1] Vattel, *Droit des Gens*, liv. iii. ch. vi. §§ 79–82; Heffter, *Droit International*, §§ 115–7.

Others say that treaties of guarantee are of the nature of a defensive alliance; and, consequently, that even where territories are guaranteed, the guarantee does not extend to wars provoked by the aggression of the party guaranteed. If, therefore, the war be manifestly unjust on the part of the ally so guaranteed, the *casus fœderis* does not take place, and the stipulation is not binding. This view is consonant with general principles; for if the war be morally wrong on the part of one ally, he cannot reasonably demand the auxiliary strength of his co-ally to assist him in its prosecution. Again, in the case of the guarantee of a treaty, it is said that the guarantee is not only not obliged, but is not even authorised to interfere to compel its performance, unless required to do so by a party guaranteed, because the contracting parties are at liberty to vary its stipulations, or dispense altogether with their performance. It follows, therefore, that a party to a treaty of guarantee is not necessarily a party to a war undertaken by his co-ally, even though it be in defence of the thing guaranteed.[1]

Alliance for war with reservation of allies

§ 18. Conflicts not unfrequently occur in warlike alliances. In the case of an alliance for war, made towards and against all, *with the reservation of allies*, this exception is to be understood to include *present* allies only, and not to extend to any subsequent treaty stipulations with other powers. Vattel supposes this case: 'Three powers have entered into a treaty of defensive alliance; two of them quarrel and make war on each other; what shall the third do? The treaty does not bind it to assist either the one or the other. For it would be absurd to say that it has promised assistance to each against the other, or to one of the two to the prejudice of the other. All that is incumbent on it is to employ its good offices for reconciling its allies; and if such mediation fail, it remains free to assist the one which shall appear to have justice on its side.' The latter part of this quotation should, perhaps, be adopted only with certain restrictions. If the alliances are such as to leave the third party in the position of a neutral, and exempt him from all obligations to assist either party, he cannot be considered at liberty to assist the one whose cause he may deem just. This fact alone would not constitute a justifiable cause of war. Moreover, as a

[1] Bello, *Derecho Internacional*, pt. ii. cap. ix. § 1.

neutral he is bound to treat both the belligerents as having justice on their side. What Vattel probably means to say is, that the third party is at liberty, *so far as his alliances are concerned*, to side with the belligerent whose cause he deems just.[1]

Warlike associates

§ 19. A warlike *association* is where the alliance is of such an intimate and perfect character as to form a union of interests; where each of the parties is bound to act with his whole force, and all are alike principals in the war at its commencement, or become so during its progress. Every associate of my enemy is indeed himself my enemy; it matters little whether anyone makes war on me directly, and in his own name, or under the auspices of another; the same rights which war gives me against my principal enemy, it also gives me against all his associates. This results directly from my right of security and of self-defence, for I am equally attacked by the one and the other. But the question is, to know who are lawfully to be accounted my enemy's associates, united against me in a war.[2]

Vattel's opinion

§ 20. Vattel discusses at some length the question, who are, and who are not to be regarded as such associates in the war, and makes the following distinctions. He regards as associates, *first*, those who make common cause with the enemy, although not appearing as principals; *second*, those who assist the enemy without being bound to do so by any treaty; *third*, those who, under the obligations of an offensive alliance, assist the principal in carrying on the war; *fourth*, those who make defensive alliance with the enemy after the commencement of the war, or on the certain prospect of its declaration, or with special reference to the defence of the enemy against the actual opposing belligerent; and *fifth*, those who have formed with the enemy, even before hostilities have commenced, a real league or society of war. All such are associates in the war. But if the defensive alliance is general in its character, leaving it doubtful when the *casus fœderis* will take place, or if it has not been made

[1] Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. ix.; De Félice, *Droit de la Nat. et des Gens*, tome ii. lec. xxviii.; Vattel, *Droit des Gens*, lib. iii. ch. vi. p. 93.

[2] Wolfius, *Jus Gentium*, §§ 730-6; Martens, *Précis du Droit des Gens*, § 300; Garden, *De la Diplomatie*, liv. vi. sec. ii. § 3; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xii.

particularly against me, nor concluded at a time when I was openly preparing for war or had already begun it, or if the allies have only stipulated in it, that each of them shall furnish a stated succour to him who shall be first attacked, such allies are not necessarily associates in the war. If auxiliaries are furnished to my enemy, they are enemies, but the nation that furnishes them are not such of necessity. By attacking such nations for that reason, says Vattel, 'I should increase the number of my enemies, and instead of a slender succour which they furnished against me, should draw on myself the united force of those nations.'[1]

No declaration necessary against enemy's associates

§ 21. As a general rule, it is not necessary to make a declaration of war against the associates of the enemy before treating them as belligerents. The nature of their obligations, or the character of their acts, makes them public enemies, and puts them in the same position towards us as if they were principals in the war. Our belligerent rights against them commence, in some cases, with the war, and in others, with their first act of hostility against us.[2] The existence of the alliance, with the acknowledgment of its obligation, and a preparation for carrying on the war, would make them public enemies, even before they actually take part in the military operations, as was the case between France and Great Britain in 1778.[3]

Policy of treating enemy's allies as friends

§ 22. But, in modern times, there are very few alliances between States which so bind them together as necessarily to make them associates in a war; it is, therefore, in general, a matter of prudence to seek to disarm the enemy's allies by treating them as friends. It is a cheap and honourable means of weakening an opponent's power, and may save the effusion of much innocent blood. The contrary course is not only impolitic on our part, but tends to prolong the war by making it more general, and by involving new elements of discord, and more complicated and conflicting interests. Neutrality may be *absolute* or *qualified; absolute* when the neutral is bound to neither belligerent by a treaty which may affect the other, and *qualified*, when the execution of a treaty

[1] Vattel, *Droit des Gens*, liv. iii. ch. vi. § 96; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. ix.; Bello, *Derecho Internacional*, pt. ii. ch. ix. § 1.

[2] See *Ann. Reg.*, 1779, p. 58 et seq.

[3] Wheaton, *Elem. Int. Law*, pt. iii. ch. ii. § 15; Phillimore, *On Int. Law*, vol. iii. § 60; Heffter, *Droit International*, § 120.

with one would affect the other. The relation of the United States to France and Great Britain, at the beginning of the war of 1793, is an example of such qualified neutrality. There is an obvious difference between an alliance and such neutrality, although it is sometimes difficult to draw the line of separation.

CHAPTER XX

RIGHTS OF WAR AS TO ENEMY'S PERSON

1. General rights of war as to enemy's person—2. Limitation of the right to take life—3. Exemption of non-combatants—4. When the exemption ceases—5. Is limited in particular cases—6. When quarter may be refused—7. Treatment due to prisoners of war—8. Made slaves in ancient times—9. Ransom and exchange—10. Moral obligation of the State towards its own subjects—11. Release on parole—12. Conditions which may be imposed—13. Delays in effecting exchange—14. Duties of a State to support its subjects in the hands of the enemy—15. Where exchanges cannot be effected—16. Historical example—17. Extent of support to be rendered—18. Where no probability of an exchange—19. May prisoners of war be put to death?—20. Useless defence of a place—21. Sacking a captured town—22. Remarks of Napier—23. Deserters found among prisoners of war—24. Rule of reciprocity—25. Limits to this rule.

General rights as to enemy's person

§ 1. IT has already been shown that war places all the subjects of one belligerent State in a hostile attitude towards all the subjects of the other belligerent;[1] and although, in order to justify us at the tribunal of conscience and in the estimation of the world, it is necessary that we should have just cause of war, and justifiable reasons for undertaking it, yet, as the justness or unjustness of a war is usually a matter of controversy between the contending parties, and not always easy to be determined, it has become an established principle of international jurisprudence that a war in form shall, in its legal effects, be considered as just on both sides, and that whatever is permitted to one of the belligerents shall also be

[1] Talleyrand writing to Napoleon (November 20, 1806) says, 'According to the maxim that war is not a relation between a man and another, but between State and State, in which private persons are only accidental enemies, not such as men, nor even as members or subjects, of the State, but simply as its defenders, the law of nations does not allow that the right of war and of conquest thence derived should be applied to peaceable, unarmed citizens, to private dwellings and properties, to the merchandise of commerce, to the magazines which contain it, to the vehicles which transport it, to unarmed ships which convey it on streams and seas, in one word, to the person and the goods of private individuals.'

permitted to the other. The law of nations makes no distinction, in this respect, between a just and an unjust war, both of the belligerent parties being entitled to all the rights of war as against the other, and with respect to neutrals. Each party may employ force, not only to resist the violence of the other, but also to secure the objects for which the war is undertaken. The first and most important of these rights, which the state of war has conferred upon the belligerents, is that of taking human life. This right, in its full extent, authorises the individuals of the one party to kill and destroy those of the other, whenever milder means are insufficient to conquer them or bring them to terms.[1]

Limitation of right to take life

§ 2. But this extreme right of war, with respect to the enemy's person, has been modified and limited by the usages and practices of modern warfare. We may lawfully kill those who are actually in arms and continue to resist. The Germans, during the last Franco-Prussian war, on taking the town of St. Ménehould, threatened death to any inhabitant who should conceal fire-arms. But we may not take the lives of those who are not in arms, or who, being in arms, cease their resistance and surrender themselves into our power. The just ends of the war may be attained by making them our prisoners, or by compelling them to give security for their future conduct. Force and severity can be used only so far as may be necessary to accomplish the objects for which the war was declared.[2]

Exemption of non-combatants

§ 3. There are certain persons in every State who, as already stated in chapter xviii., are exempt from the direct operations of war. Feeble old men, women, and

[1] Hautefeuille, *Des Nations Neutres*, tit. vii. ch. i.; Vattel, *Droit des Gens*, liv. iii. ch. viii. §§ 136, 137, 138; Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 1; Phillimore, *On Int. Law*, vol. iii. § 50.

[2] Cornu *v.* Blackburne; 2 *Dougl.*, 644; the 'Fladoyen,' 1 *Rob.*, 134. 'In 1780 Lord Cornwallis, commanding the British forces, complained to the American Major-General Gates, that the officers and men taken at King's Mountain were treated with an inhumanity scarcely credible. Also he writes to Sir Henry Clinton, "However provoked by the horrid outrages and cruelties of the enemy in this district, I have always endeavoured to soften the horrors of war, and received the acknowledgment of General Gates and the principal officers of the enemy's army for the tenderness and attention shown to their wounded and prisoners. I will not hurt your excellency's feelings by attempting to describe the shocking tortures and inhuman murders which are every day committed by the enemy, not only on those who have taken part with us, but on many who refuse to join them."'—*Cornwallis*, vol. i.

children, and sick persons, come under the general description of enemies, and we have certain rights over them as members of the community with which we are at war; but, as they are enemies who make no resistance, we have no right to maltreat their persons, or to use any violence toward them, much less to take their lives.[1] This is so plain a maxim of justice and humanity, that every nation in the least degree civilised acquiesces in it. And modern practice has applied the same rule to ministers of religion, to men of science and letters, to professional men, artists, merchants, mechanics, agriculturists, labourers —in fine, to all non-combatants, or persons who take no part in the war, and make no resistance to our arms. The Convention of Geneva, 1864, establishes certain rules for hospitals, ambulances, and protection of wounded soldiers in time of war;[2] ratifications have been exchanged between the

[1] It has pased into French history, that in 1870, the Bavarians having been fired on by some civilians in the uniform of National Guards, set Bazeilles on fire, and drove back into the flames the inhabitants—old, young, women, and children—as they were endeavouring to escape. An eye-witness, 'M.P.,' writing to the *Times* (Sept. 8), denies this. Bazeilles certainly was on fire in many places, from shells, during the battle of Sedan, and the Bavarians did their best to burn out French soldiers who were attacking them from houses, and who refused to surrender. The same eye-witness speaks of some armed civilians, taken with arms in their hands on that occasion, and says that, far from being burnt alive, they were reserved for the rope the next morning (Edwards, *The Germans in France*). After the first occupation of Amiens, the Prussians marched out, leaving their wounded behind. The mayor, having no armed force with which to protect them, and serious fears being entertained for their safety, wrote over the doors of the hospitals, 'Honneur d'Amiens! Respect aux blessés!' This act restrained the excited townspeople (*ibid.*)

[2] During the Franco-Prussian war, 1870, French medical officers, protected by the badge of Geneva, attended their own wounded at Soulz les Forêts after the battle of Woerth. Even *irregular* workers under the Geneva badge, although arrested, were not detained by either side. It was reported by the German commandant at Lichtenberg that the French had fired on the Geneva badge, and that Turcos had cut off an officer's head and killed some wounded men. The Crown Prince remarked that the Geneva flag had been fired on several times. The not unfrequent reports of one or other belligerent having fired on the Red Cross officials, is doubtless correct, and to be explained by the fact of these officials wearing a military or other uniform, which fails to distinguish them at short range from fighting men. It is most desirable that a universal, international, non-combatant uniform should be agreed on, which could be recognised at any reasonable distance, with minor distinctive decorative features which would denote the wearers' nationality. The most stupid soldiery could not plead ignorance of a Red Cross official, as they would have been thoroughly accustomed to the dress worn by their own non-fighting men in their own camps.

principal civilised States. In 1868 additional Articles were proposed by several States for the purpose of extending the scope of the original Articles to hospital-ships, but they have not yet been ratified. The Articles of 1864 and of 1868 are both set out in full in an appendix to this chapter.

It was the received opinion in ancient Rome, in the times of Cato and Cicero, that one who was not regularly enrolled as a soldier could not lawfully kill an enemy. But afterwards in Italy, and more particularly during the lawless confusion of the feudal ages, hostilities were carried on by all classes of persons, and everyone capable of being a soldier was regarded as such, and all the rights of war attached to his person. But as wars are now carried on by regular troops, or, at least, by forces regularly organised, the peasants, merchants, manufacturers, agriculturists, and, generally, all public and private persons, who are engaged in the ordinary pursuits of life, and take no part in military operations, have nothing to fear from the sword of the enemy. So long as they

The Prussians, during their occupation of Versailles, required a bulletin of the health of the wounded Frenchmen, lying in the hospital of that town, to be sent to the commanding general every morning. The convalescents received an immediate order to leave for Germany as prisoners of war. Their departure from the hospital was watched by armed soldiers. The chief physician protested against their removal, as contrary to the fifth additional article of the above Convention, but in vain (Delerot, *Versailles*, 1870). On December 21, 1870, a German official gave notice, in writing, to the International French Society of Versailles, that it was dissolved, and that the members of ambulances, who were not native of Versailles, were to leave, for the adjoining departments, within the space of two days. It is unknown from whose authority this order emanated, but the Prussian commanding general annulled it, and requested the society to continue their duties (*ibid.*) At Rouen the Geneva flag was employed by the French to protect a hearse. (Edwards, *The Germans in France*).

The examples of Cyrus, and of the Emperor Aurelian, in ancient history are not wanting to illustrate compassion for the sick and wounded in war. During the middle ages, the members of the Teutonic Order of Knighthood devoted themselves to the service of sick and wounded soldiers. This Order was founded in 1190, during the siege of Acre, by some Bremen merchants, who being moved with compassion at the sight of the miseries which the besiegers suffered, erected a hospital, where they gave constant attendance to all who had recourse to their charity. Their dress was a white mantle, with a black cross on it (*Raymondi Duellii Hist. Ord. Teut.*) In more modern times we read of the agreement between Louis XV. of France with Frederick the Great, that those persons who might attend on the sick and wounded during war should be treated as neutrals. Napoleon III., after the battle of Montebello (1859), restored to the enemy all wounded prisoners, without requiring any exchange.

refrain from all hostilities, pay the military contributions which may be imposed on them and quietly submit to the authority of the belligerent who may happen to be in the military possession of their country, they are allowed to continue in the enjoyment of their property, and in the pursuit of their ordinary avocations. This system has greatly mitigated the evils of war, and if the general, in military occupation of hostile territory, keeps his soldiery in proper discipline, and protects the country-people in their labours, allowing them to come freely to his camp to sell their provisions, he usually has no difficulty in procuring subsistence for his army, and avoids many of the dangers incident to a position in a hostile territory.[1]

Exemption may be forfeited

§ 4. But this exemption of the enemy's persons from the extreme rights of war is strictly confined to non-combatants, or such as refrain from all acts of hostility. If the peasantry and common people of a country use force, or commit acts in violation of the milder rules of modern warfare, they subject themselves to the common fate of military men, and sometimes to a still harsher treatment. And if ministers of religion and females so far forget their profession and sex as to take up arms, or to incite others to do so, they are no longer exempted from the rights of war, although always within the rules of humanity, honour, and chivalry. And even if a portion of the non-combatant inhabitants of a particular place become active participants in the hostile operations, the entire community are sometimes subjected to the more rigid rules of war.

Exemption is limited

§ 5. Moreover, in some cases, even where no opposition is made by the non-combatant inhabitants of a particular place, the exemption properly extends no further than to the sparing of their lives; for if the commander of the belligerent forces has good reason to mistrust the inhabitants of any place, he has a right to disarm them, and to require security for their good conduct. He may lawfully retain them as prisoners, either with a view to prevent them from taking up arms, or for the purpose of weakening the enemy. Even women and

[1] Lord Wellington writing of the dastardly conduct of the Spanish troops, says that they had become odious to their country. The peaceable inhabitants, much as they detested and suffered from the French, almost wished for the establishment of Joseph Bonaparte's government, to be protected from the outrages of their own troops.

children may be held in confinement, if circumstances render such a measure necessary, in order to secure the just objects of the war. But if the general, without reason, and from mere caprice, refuses women and children their liberty, he will be taxed with harshness and brutality, and will be justly censured for not conforming to a custom established by humanity. When, however, he has good and sufficient reasons for disregarding, in this particular, the rules of politeness and the suggestions of pity, he may do so without being justly accused of violating the laws of war. The presumption, however, is against him, and, if he wishes to preserve a fair fame, he must give good and satisfactory reasons for conduct so unusual.[1]

Prisoners entitled to quarter

§ 6. As the right to kill an enemy in war is applicable only to such public enemies as make forcible resistance, this right necessarily ceases so soon as the enemy lays down his arms and surrenders his person or asks for quarter. 'Qui merci prie, merci doit avoir,' is an old maxim. After such surrender, the opposing belligerent has no power over his life, unless new rights are given by some new attempt at resistance. By the present rules of international law, quarter can be refused the enemy only in cases where those asking it have forfeited their lives by some crime against the conqueror under the laws and usages of war.

Treatment of prisoners of war

§ 7. Although the practice of putting to death prisoners of war has become obsolete among all civilised nations—for we deem the killing of wounded French and English soldiers, helpless on the battle-field, by the Russians in the Crimean war of 1854 to have been a sad exception—yet it is to be

[1] Vattel, *Droit des Gens*, liv. iii. ch. viii. §§ 147, 148; Phillimore, *On Int. Law*, vol. iii. §§ 94, 95.

By order of the War Department, a circular was issued to the army of the United States, in February 1866, that copies of such newspapers as were published in the several military departments, and which contained sentiments of hostility to the Government, should be sent to headquarters, and that it should be stated whether such papers were habitual in the utterance of such sentiments; the persistent publication of articles calculated to keep up hostility of feeling between the people of different parts of the United States could not be tolerated.

Letters of advice, correspondence, and intelligence, from an English subject in England, to the enemy to enable the latter to cause annoyance or to defend themselves, written and sent in, in order to be delivered to them, are, though intercepted, overt acts of treason.—R. *v.* Hensey, 1 *Burr. R.*, 650; R. *v.* Stone, 6 *D. and E.*, 527.

entirely attributed to the clemency of the victor; the right remains, and might still be exercised in cases of dire necessity. The garrison of El Arish, near Gaza, having capitulated to Buonaparte, during the time of the campaign in Egypt, he set it free on the condition that it should proceed to Bagdad, and not serve against the French for a year. Having arrived at Jaffa, he found it necessary to make an assault before his troops could take possession of it, on which occasion three thousand prisoners were taken, who turned out to be, for the most part, those very soldiers whose lives and liberty had been spared upon conditions which they had immediately violated. To restore these prisoners a second time to liberty was, in fact, to send fresh recruits to the Turks; to forward them to Egypt under escort was to lessen the strength of an army already too weak. The law of necessity decided their fate; they were treated, in consequence of such an act of perjury, in the same manner as they had treated the French wounded after a battle, whose heads they cut off on the spot. By the milder rules of modern warfare, prisoners of war cannot be treated harshly, but the captor may, nevertheless, take all proper measures for their security, and, if there be reason to apprehend that they will rise on their captors, or make their escape, he may put them in confinement and even fetter them. But extreme measures should never be resorted to except in cases of absolute necessity. Persons who escape from, and are retaken by the enemy, or even who are recaptured in battle, do not deserve any punishment, for they have only obeyed their love of liberty.

Self-security is the first law of the conqueror, and the laws of war justify the use of means necessary to that end, but, beyond that, no harshness or severity is allowable. Each particular case, as it arises, must be judged by the attending circumstances, the means employed, and the danger they were designed to guard against. The responsibility of a commanding officer is always very great, and his conduct should not be hastily condemned, as it may be induced by circumstances not generally known, or easily explained. Too much leniency is often as fatal to his plans as an unjust severity to his reputation for humanity. He should be judged by his general course and character, rather than by a single

act, the motives of which are so easily misunderstood, and so often misconstrued.[1]

Vattel is evidently of opinion that cases may occur where the putting of prisoners of war to death may be justifiable. 'But,' he says, 'to justify us in coolly and deliberately putting to death a great number of prisoners, the following conditions are indispensable: 1st, That no promise has been made to spare their lives; and 2nd, That we be perfectly assured that our own safety demands such a sacrifice. If it is at all consistent with prudence, either to trust to their parole, or to disregard their perfidy, a generous enemy will rather listen to the voice of humanity than to that of timid circumspection. Charles XII., being encumbered with his prisoners after the battle of Narva, only disarmed them, and set them at liberty; but his enemy, still impressed with the apprehensions which his warlike and formidable opponents had excited in his mind, sent into Siberia all the prisoners he took at Pultowa. The Swedish hero confided too much in his own generosity: the sagacious monarch of Russia united, perhaps, too great a degree of severity with his prudence. When Admiral Anson took the rich Acapulco galleon, near Manilla, he found that the prisoners outnumbered his whole ship's company; he was, therefore, under the necessity of confining them in the hold, where they suffered cruel distress. But, had he exposed himself to the risk of being carried away a prisoner, with his prize and his own ship together, would the humanity of his conduct have justified the imprudence of it? Henry V., King of England, after his victory in the battle of Agincourt, was reduced, or thought himself reduced, to the cruel necessity of sacrificing the prisoners to his own safety.' 'Nothing,' continues Vattel, 'short of the greatest necessity, can justify so terrible an execution; and the general, whose situation requires it, is greatly to be pitied.' At the present day, the conduct of any general who should deliberately put his prisoners to death would probably be declared infamous.[2]

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 2; Vattel, *Droit des Gens*, liv. iii. ch. viii. §§ 149, 150, 152; Phillimore, *On Int. Law*, vol. iii. § 95; Martens, *Précis du Droit des Gens*, § 275; Speech of Lord J. Russell, House of Commons, December 1854.

During the Peninsular war the people of Talavera, and Spanish soldiers, beat out the brains of wounded Frenchmen lying on the battle-field in the neighbourhood. The English, in every case, checked these inhuman perpetrators. (Nap. *Pén.* vol. ii.)

[2] Vattel, *Droit des Gens*, liv. iii. ch. viii. § 151; Manning, *Law of*

Made slaves in ancient times

§ 8. To the ancient practice of putting prisoners of war to death succeeded that of making them slaves, and it was exercised for many ages. It had not become extinct in England in 1628,[1] so far as detention of prisoners by private persons is concerned. The Dutch used to sell to the Spaniards, as slaves, the Algerines whom they had taken prisoners in the Atlantic or Mediterranean. In the 1664 the States-General gave orders to their admiral to sell as slaves all the pirates he should take. But the custom of making slaves of prisoners of war has fallen into disuse among Christians, although the right remains. It was on this principle that Buonaparte was sent to Elba and St. Helena by the British Government at the beginning of this century, and that Arabi Pasha was exiled to Ceylon by the Egyptian Government at the close of 1882.

Ransom and exchange

§ 9. The practice of slavery gradually gave way to that of *ransoming*, which continued through the feudal wars of the middle ages. By a cartel of March 12, 1780, between France and England, the ransom in the case of a field-marshal of France, or an English field-marshal, or captain-general, was fixed at sixty pounds sterling. And even as late as the treaty of Amiens, in 1802, between Great Britain and the French and Batavian republics, it was deemed necessary to stipulate that the prisoners on both sides should be restored *without ransom*. The present usage, of exchanging prisoners without any ranson, was early introduced among the more polished nations, and was pretty firmly established in Europe before the end of the seventeenth century. But this usage is not, even now, considered obligatory upon those who do not choose to enter into a cartel for that purpose. If a nation finds a considerable advantage in leaving its soldiers prisoners with the enemy during the war, rather than exchange them, it may certainly, unless bound by cartel, act as is most agreeable to its interests. This would be the case of a State abounding in men, and at war with a nation more formidable by the courage than the number of its soldiers. It would have been of little advantage to the czar, Peter the Great, to restore the Swedes his prisoners for an equal number of

Nations, p. 165. Rutherforth, *Institutes*, book ii. chap. ix. § 17; Phillimore, *On Int. Law*, vol. iii. § 95; Burke, *Works*, vol. iv. p. 127.

[1] Rymer *Fœdera*, 8, ii. 270.

Russians. In 1810 Great Britain had, confined in prisons, hulks, and guard-ships, about fifty thousand French prisoners of war, while Napoleon had a much less number of English, but probably enough Spanish and Portuguese prisoners (allies of England) to more than make up the equality of numbers. He offered to exchange the whole against the whole, or one thousand English and two thousand Spanish and Portuguese for three thousand French. But the British negotiators at first insisted upon the exchange being confined to French and English; they, however, afterward consented to a general exchange, beginning with the English for an equal number of Frenchmen. Napoleon would not agree to this, because, he said, as soon as the English got back their own countrymen, they would find some excuse for not carrying the exchange further, and retain the remainder of the French in the hulks for ever. The negotiations were, therefore, broken off. That both parties had a legal right to decline the exchange cannot be denied. Napoleon's proposition was in accordance with the usages of war in such cases, and not unreasonable in itself; while England was bound to provide for the exchange of her allies who had been made prisoners in the common cause. But if she believed that she would, by the proposed arrangement, lose more than she gained in relative power, she had an undoubted right to decline its acceptance.[1]

No positive obligation to exchange

§ 10. But while no State is obliged, by the positive rules of international law, to enter into a cartel for the exchange of prisoners of war, there is a strong moral duty imposed upon the Government of every State to provide for the release of such of its citizens and allies as have fallen into the hands of the enemy. They have fallen into this misfortune only by acting in its service, and in the support of its cause. This is a care which the State owes to those who have exposed themselves in her defence.

Release on parole

§ 11. Sometimes prisoners of war are permitted to resume their liberty, upon the condition that they will not again take up arms against their captors, either for a limited time, or

[1] Las Cases, *Mémoires de Sainte-Hélène*, tome vii. pp. 39, 40; Alison, *Hist. of Europe*, vol. iii. pp. 394, 395; *Annual Register*, 1811, p. 76; *Parliamentary Debates*, vol. xx. pp. 623-691.

Wheaton, *Hist. Law of Nations*, pp. 162-4; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. vi.; Phillimore, *On Int. Law*, vol. iii. § 95; Heffter, *Droit International*, §§ 126-9.

during the continuance of the war, or until duly exchanged. Officers are very frequently released upon their parole, subject to the same conditions. Such agreements made by officers for themselves, or by a commander for his troops, are valid, and cannot be annulled by the State to which they belong. Agreements of this kind come within the necessary limits of the implied powers of the commander, and are obligatory upon the State. Good faith and humanity ought to preside over the execution of these compacts, which are designed to mitigate the evils of war, without defeating its legitimate purposes.

Conditions imposed on release

§ 12. There are certain limits to the conditions which the captor may impose on the release of prisoners of war, and to the stipulations which an officer is authorised to enter into, either for himself or for his troops. The captor may impose the condition that the prisoners shall not take up arms against him, either for a limited period or during the war; but he cannot require them to renounce for ever the right to bear arms against him; nor can they, on their part, enter into any engagements inconsistent with their character and duties as citizens and subjects. Such engagements made by them would not be binding upon their sovereign or State. The reason of this limitation is obvious: the captor has the absolute right to keep his prisoners in confinement till the termination of the war; but on the conclusion of peace he would no longer have any reasons for detaining them. They, therefore, have the right to stipulate for their conduct during that period, but not beyond the time when they would have been released had no agreement been entered into. Nor can the captor generally impose conditions which extend beyond the period when the prisoners would necessarily be entitled to their liberty. Beyond this, their services are due to, and at the disposition of, the State to which they owe allegiance, and they have no right to limit them by contracts with a foreign power.[1] The following answer was directed by General Halleck to be returned to the general commanding the Confederate forces, who had complained that many citizens of the United States, engaged in peaceful avocations, had been imprisoned because they refused to take the oath of allegiance

[1] Bello, *Derecho Internacional*, pt. ii. cap. iii. § 5; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 32.

to the United States, while others *per duress* had been required to take an oath not to bear arms against that Government:—'August 13, 1862. The Government of the United States has never authorised any extortion of oaths of allegiance or military paroles, and has forbidden any measures to be resorted to tending to that end. Instead of extorting oaths of allegiance and paroles it has refused the application of several thousand prisoners to be permitted to take them, and return to their homes in the rebel States. At the same time this Government claims and will exercise the right to arrest, imprison, or place beyond its military lines any persons suspected of giving aid and information to its enemies, or of any other treasonable act. And if persons so arrested voluntarily take the oath of allegiance, or give their military parole, and afterwards violate their plighted faith, they will be punished according to the laws and usages of war. You will assure General Lee that no unseemly threats of retaliation on his part will deter this Government from exercising its lawful rights over both prisoners and property of whatever name or character.'

Delay in making exchanges

§ 13. By the modern usage of nations, commissaries are permitted to reside in the respective belligerent countries, for the purpose of negotiating and carrying into effect the necessary arrangements for the support, as well as the release and exchange of prisoners of war, but difficulties sometimes occur in arranging the terms of such agreements, and it not unfrequently happens that a considerable length of time will elapse after their capture before they can be exchanged or released. Moreover, by the conditions of their parole, they are sometimes required to remain in the captor's country for a fixed term after their release. During these periods they must be subsisted either by the captor or by their own Government, and it sometimes becomes a question to which this duty properly belongs.[1]

General rule for support of prisoners

§ 14. The duty of a State to support its subjects, while prisoners in the hands of an enemy, is the same as its duty to provide for their ransom and release. Indeed, a neglect, or refusal to do so, would seem to be even more criminal than a neglect or refusal to provide for their exchange; for the

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 3; Phillimore, *On Int. Law*, vol. iii. § 95.

exigencies of the war may make it the temporary policy of the State to decline an exchange, but nothing can excuse it in leaving its subjects to suffer in an enemy's country, without any fault of their own, when the State has the means of relieving them from the misfortune in which they are involved, by acting in its service and by supporting its cause. It follows, therefore, that although a State may properly, under certain circumstances, refuse to exchange its prisoners, it cannot, without a violation of moral duty, neglect to make the proper and necessary arrangement for their support while they are thus retained, by a captor who is willing to exchange them. It is stated that, in the wars of Napoleon, the British authorities regularly remitted the whole cost of the support of English prisoners, in France, to the French Government, but that the latter failed to make any provision whatever for the support of its subjects in the hands of the English, leaving them to starvation, or the charity of their enemies. The Earl of Liverpool, referring in 1814 to the large sum of money then due from the French to the British Government for the maintenance of prisoners of war, remarks that an Article to liquidate such debts has usually been inserted in treaties of peace, but that he did not believe in the present case such an Article would be likely to give the British Government the money, and that it certainly could not give it without material pressure and inconvenience to the French Government; that it occurred to him, therefore, there might be some grace in abandoning it, and that the honour of the French Government might perhaps be saved, on some other points, by a formal relinquishment of the claim in an Article of the treaty, and that he was sincerely desirous to see the credit of the French upheld, as far as the English Government could contribute to it without sacrifice of its public principles.[1]

Where exchanges cannot be effected

§ 15. It not unfrequently happens in a war, that, although both parties are willing to make an exchange of prisoners, much delay occurs in agreeing upon the terms of the cartel. This sometimes results from a want of good faith on both sides, the parties entering into negotiations with no intention of coming to an agreement. Again, when the cartel has been

[1] Alison, *Hist. of Europe*, vol. iii. pp. 394, 395; Hansard, *Parliamentary Debates*, vol. xx. pp. 634, 694; Hardenburg, *Mémoires d'un Homme d'Etat*, tome ii. p. 438; tome ix. p. 105; Las Cases, *Mémoires de Sainte-Hélène*, tome vii. pp. 39, 40; *Annual Register*, 1811, p. 76.

negotiated, it is sometimes impossible to carry it into effect immediately, the peculiar circumstances of the war and the character of the military operations interrupting, or preventing, its execution. Such delays are the more frequent in great wars, which embrace several countries and seas, within the theatre of their operations. In all cases where the circumstances prevent an exchange of prisoners of war, or render it impossible for them to receive the means of support from their own State, it is the duty of the captor to furnish them with subsistence; for humanity would forbid his allowing them to suffer or starve. But if their own Government should refuse to make arrangements for their support, exchange, or release, and if the captor should give them sufficient liberty to enable them to earn their own support, his responsibility ceases, and whatever sufferings may result, are justly chargeable upon their own Government. Under ordinary circumstances, prisoners of war are not required to labour beyond the usual police duty of camp and garrison; but where their own State refuses, or wilfully neglects to provide for their release or support, it is not unreasonable in the captor to require them to pay with their labour for the subsistence which he furnishes them. But this can be done only in extreme cases, and even then they should be treated kindly and with mildness, and no degrading or very onerous labour should be imposed on them. All harshness and unnecessary severity would be contrary to the modern laws of war.[1]

Historical example

§ 16. But, sometimes the captor refuses to enter into any cartel for the exchange of his prisoners, or even to release them on parole. He may, for reasons satisfactory to himself, persist in retaining in confinement the prisoners whom he has taken from the enemy, at the same time leaving the enemy to keep and provide for those of his own people, which the latter may have captured. In such a case he cannot expect the opposing belligerent to provide for the support of prisoners thus retained, and the laws of war as well as of humanity require that he himself shall provide, in a proper manner, for their subsistence. In 1809 the Spaniards had sent thousands of prisoners of war to the Balearic Isles without any order

[1] Wildman, *Int. Law*, vol. ii. p. 26; Scott, *United States Army Rcg.*, 1825, §§ 709-716; the 'St. Juan,' 5 *Rob. Rep.*, p. 39; Heffter, *Droit International*, § 129.

for their subsistence, and the Junta, when remonstrated with, cast 7,000 ashore on the little desert rock of Cabrera. At Majorca numbers had been massacred by the inhabitants in the most cowardly and brutal manner, but those left on Cabrera suffered miseries that can scarcely be described. Afflicted with hunger, thirst, and nakedness, they lived like wild beasts. Less than 2,000 remained to tell the tale of this inhumanity. After the fall of Tarragona in 1811, Suchet, the French commander, offered to exchange his Catalonian prisoners, the best soldiers in Spain, for the French prisoners confined at Cabrera, men utterly ruined in constitution by their cruel captivity. Cuesta, the Spanish general, was disposed to accede to the proposition, but the Regency, at the request of Wellesley, the British envoy, peremptorily forbad the exchange; and the French prisoners therefore remained, says Napier, 'a disgrace to Spain, and to England, for if her envoy interfered to prevent their release, she was bound to insist that thousands of men, whose prolonged captivity was the result of her interference, should not be exposed on a barren rock, naked as they were born, and fighting for each other's miserable rations, to prolong an existence inconceivably wretched.'[1]

Character of support to be given

§ 17. Where circumstances render it obligatory upon the captor to support the prisoners whom he has taken, this support is usually limited to the regular provision ration, and such clothing and fuel as may be absolutely necessary to prevent suffering. Officers and other persons who have the means of paying for their support cannot require any assistance from the captor. But such as have no money, are certainly entitled to an allowance sufficient for personal comfort; and modern custom and military usage require that it should be proportioned to the rank, dignity, and character of the prisoner. It, however, can never properly be required for any considerable length of time, as prisoners of this description are bound to provide for their own support as soon as they can procure the means of doing so. The moneys expended for the support of prisoners of war may constitute a just demand for reimbursement; and such amounts are either settled by commissioners during the war, or become subjects of stipulations in a treaty of peace.[2]

[1] Napier, *Hist. Peninsular War*, vol. ii. p. 409.

[2] Wildman, *Int. Law*, vol. ii. p. 26; Garden, *De la Diplomatie*,

§ 18. As there is usually no very great disparity of numbers in the prisoners taken by the opposing belligerents in the course of the war, it is the more modern custom for each captor to support those who may fall into his hands till an exchange can be effected, and a cartel for this purpose is usually negotiated at the earliest possible opportunity. It, however, sometimes happens that so very large a number are taken by one party, as to leave no probability of an immediate exchange. The captor is then left the alternative to support them or to release them on parole. But should they refuse to give their parole, or should their own Government forbid their doing so? In the first case they must suffer the consequences of their own obstinacy; and, in the second case, their own Government has no right to forbid their release on parole, unless at the same time it provides the means for their support during their imprisonment. Attempts have sometimes been made to annul such engagements, and to force released prisoners of war to take up arms again in the same campaign, in direct violation of their parole. Such an act on the part of a belligerent Government is utterly futile as a protection to soldiers who may thus be made to violate their parole, and is an evidence of ignorance or semi-barbarism of the Government making such a declaration. In the war between the United States and the republic of Mexico the Mexican authorities not only attempted by proclamation to induce such of their soldiers as had been released by the Americans on parole to regard that obligation as null and void, but in some cases their unexchanged prisoners were actually forced to re-enter the ranks and fight. Many others, under the promise of plunder, were induced to organise themselves into guerrilla bands under robber chiefs, who were furnished with military commissions from the Government. Such attempts to violate the ordinary rules of war not only justify, but require prompt and severe punishment. Accordingly, General Scott announced his intention to hang everyone who should be retaken after thus violating his parole of honour. In making further releases on parole he required, in addition to the ordinary military pledge, the sanctity of a religious oath, administered by the Mexican clergy.[1]

Where no probability of an exchange

liv. vi. § 9; Scott, *United States Army Regulations of* 1825, §§ 709, 716.

[1] *Cong. Doc.*, 30 *Cong.*, 1 *Sess. H. R. Ex. Doc.*, No. 56, p. 245;

May he kill them in certain cases?

§ 19. Cases have sometimes occurred where a general has taken so large a number of prisoners that he cannot keep them with safety, or cannot supply them with food, and is satisfied that, if released on their parole, they would not respect it. If he has not the means of keeping his prisoners, and can safely put them on parole, he is, of course, bound to release them. But the question arises, if he cannot safely do this, and has no means to subsist them, what is he to do? Must he release them, to the imminent danger of his own security, or to his certain destruction, or, will the law of self-defence justify him in putting them to death? If his own safety is incompatible with that of an enemy—even of an enemy who has submitted—will his duty to his own State justify him in destroying that enemy? The extreme case here supposed can seldom, if ever, happen; the answer must be elicited from the arguments in paragraph 7.

Useless defence of a place

§ 20. It was an ancient maxim of war, that a weak garrison forfeit all claim to mercy on the part of the conqueror, when, with more courage than prudence, they obstinately persevere in defending an ill-fortified place against a large army, and when, refusing to accept of reasonable conditions offered to them, they undertake to arrest the progress of a power which they are unable to resist. Pursuant to this maxim, Cæsar answered the Aduatici that he would spare their town, if they surrendered before the battering-ram touched their walls. But, though sometimes practised in modern warfare, it is generally condemned as contrary to humanity and inconsistent with the principles which, among civilised and Christian nations, form the basis of the laws of war. It is sometimes said, that where a garrison makes an obstinate defence of a weak place against an overwhelming force, it only causes useless effusion of human blood, and that, therefore, the authors of such a sacrifice should be severely punished. But who can say beforehand that such a defence may not save the State by delaying the operations of the enemy? There are numerous instances, in ancient as well as modern times, where courage has supplied the defects of fortifications, and where places generally regarded as untenable have been defended by a brave and determined garrison

Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. xxiii. §§ 6–10; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xii.

till the enemy consumed his strength in the operation of the siege, and wasted the most favourable season for conducting the campaign. In 1760 General Landolm, on appearing before Breslau to besiege that place, informed the governor (*inter alia*) that in case of obstinacy he could expect no reasonable terms; that the place was a mercantile town, not a fortress; and that he could not defend it without contravening the laws of war. The governor, Count Tavenzien, respected these laws, but did not the less defend the place. He replied that, being surrounded with work and wet ditches, it was to be considered a place of strength, and not merely a mercantile town, that the king had ordered him to defend it to the last extremity, and that he was not frightened at the general's threats to destroy the town, for he was not entrusted with the care of the houses but of the fortifications. The town was most bravely defended, and Landolm eventually was forced to withdraw. In case a place is closely besieged it is customary for the besieging general to offer to the garrison honourable terms of capitulation; and if they refuse these terms, and the place is carried by force, they may be compelled to surrender at discretion, and the captor may treat such prisoners with all the severity of the law of war. But that law, says Vattel, can never extend so far as to give a right to take away the life of an enemy who lays down his arms, unless he has been guilty of some crime against the conqueror. Where, however, the resistance is not only evidently fruitless and without any reasonable object, but springs from obstinacy instead of firmness of valour, the officer so resisting is guilty of one of the greatest of crimes—the useless sacrifice of human life; and not only does he deserve to be treated with extreme severity by the captor, but also his own Government should see that he be justly dealt with for so serious an offence. But the resistance in such a case must be obviously useless, and known to be such when it is made. If there is any probability of success he is justifiable in holding out to the last extremity.[1]

Sacking a captured town

§ 21. We do not, at the present day, often hear, when a town is carried by assault, that the garrison is put to the

[1] Vattel, *Droit des Gens*, liv. iii. ch. viii. § 143; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. iii.; Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. iv. § 13; cap. xi. § 16.

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of places taken by assault were not entitled to quarter, or that any rule of modern warfare justified the sacking of captured fortresses, and the pillage and murder of their inhabitants. And yet it would be difficult to find in the history of the most barbarous ages, scenes of drunkenness, lust, rapine, plunder, cruelty, murder, and ferocity equal to those which followed the captures of Ciudad Rodrigo, Badajos, and San Sebastian. The only excuse offered for these horrible atrocities was: 'The soldiers were not to be controlled!' Napier, the English historian of that war, says, in plain terms, 'That excuse will not suffice; for a young colonel of energetic spirit did constrain his men at Ciudad Rodrigo, to keep their ranks for a long time after the disorder commenced; but as no previous general measures had been taken, and no organised efforts made by higher authorities, the men were finally carried away in the increasing tumult.' 'It is said,' remarks the same author, 'that no soldier can be restrained after storming a town, and a British soldier least of all, because he is brutish and insensible of honour! Shame on such calumnies! . . . Undoubtedly, if soldiers hear and read that it is impossible to restrain their violence, they will not be restrained. But let the plunder of a town, after an assault, be expressly made criminal by the articles of war, with a due punishment attached; let it be constantly impressed upon the troops that such conduct is as much opposed to military honour and discipline as it is to morality; . . . let instantaneous punishment —death if necessary—be inflicted for such offences. With such regulations, the storming of towns would not produce more military disorders than the gaining of battles in the field.'[1]

§ 23. Deserters, found by the victor among his enemies, are guilty of a crime against him, and he has an undoubted right to punish them, and even to put them to death. They are not properly considered as military enemies, nor can they claim to be treated as such; they are perfidious citizens, who have committed an offence against the State; their enlistment with the enemy cannot obliterate that character, nor exempt them from the punishment they have deserved, and they are

Deserters

[1] Napier, *Peninsular War*, book xxii. chap. ii.; Jomini, *Vie Politique et Mil. de Napoléon*, chaps. xiv., xvii.; Alison, *Hist. of Europe*, vol. iii. pp. 464, 470; vol. iv. p. 240; Southey, *Peninsular War*, vol. vi. p. 240; Belmas, *Sièges*, &c., tome iv. pp. 279, 469, app.; Jones, *War in Spain*, vol. ii. pp. 64, 76, 80; Thiers, *Le Consulat et l'Empire*, tome xiii. pp. 355, 375.

generally punished under some municipal law. They are not protected by any compact of war, as a truce, capitulation, cartel, &c., unless specially and particularly mentioned and provided for. They are not military enemies in the general meaning of that term, nor are they entitled to the rights of ordinary prisoners of war, either under the law of nations, or by the general terms of a special compact or agreement. But when stipulations of amnesty are introduced into such compacts, in such terms as to include such deserters, by fair and proper intendment, good faith requires that all promises of this kind be honestly and fairly carried into effect. A violation of such agreements is infamous. Amnesties of this character are very common where the principal war is accompanied with insurrections and civil commotions, involving questions of personal duty and allegiance.[1]

Rule of reciprocity

§ 24. In the operations of a war, the belligerent States not unfrequently adopt the *rule of reciprocity*, both with respect to the person and property of the enemy. Moreover, the same rule, as will be shown hereafter, is extended to neutrals. There is much justice and good sense in this rule, if confined within proper limits. As already remarked, modern usage has restricted many of the extreme rights of war, or at least limited their exercise and application. But this usage has not yet assumed the character of a positive law, and a belligerent will sometimes refuse to acknowledge its doctrines as fully established, or its rules as obligatory. In such a case, the opposing belligerent applies the rule of reciprocity, and metes out to his enemy the same measure of justice which he receives from him. Thus, if his enemy releases, on parole, prisoners of war, he does the same; if his enemy levies heavy contributions upon the conquered, he does the same; and if the enemy, exercising the extreme rights of war, seizes and

[1] Vattel, *Droit des Gens*, liv. iii. ch. viii. § 144; Heffter, *Droit International*, § 126; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xiv.

The Duke of Wellington writing to Sir H. Wellesley, 1810, says, 'Since I have commanded the troops in this country I have always treated the French officers and soldiers who have been made prisoners with the utmost humanity and attention; and in numerous instances I have saved their lives. . . . I must do the French the justice to say that our officers and soldiers who fell into their hands have been universally well treated, and in recent instances the wounded prisoners of the British army have been taken care of before the wounded of the French army.'

destroys, or converts to his own use, public and private property, he retaliates by measures of the same character.[1]

§ 25. There is, however, a limit to this rule of reciprocity. If the enemy refuses to shape his conduct by the milder usages of war, and adopts the extreme and rigorous principles of former ages, we may do the same; but if he exceeds these extreme rights, and becomes barbarous and cruel in his conduct, we cannot, as a general thing, follow and retort upon his subjects, by treating them in like manner. We cannot go beyond the limits prescribed by international law to the rights of belligerents. The seizure and condemnation of French vessels by Great Britain, in 1803, was an exercise of an ancient and severe rule of war, for which Napoleon retaliated by the exercise of a still more extreme right, contrary to the milder rules of modern usage, by seizing all English travellers in French territory. This was regarded by the British Government as a return to barbarism, and they refused to regard the *détenus* as prisoners lawfully captured. However, in 1811, the British Government determined that all military and naval prisoners should be first exchanged, and, as there would remain a great surplus of French prisoners, it seemed a dictate of humanity to relieve the *détenus* by continuing the cartel for them, it being vain to urge the practice of modern warfare on the then French Government. If an enemy should massacre all prisoners of war, this would not afford a sufficient justification for the opposing belligerent to do the same. Suppose our enemy should use poisoned weapons, or poison springs and food, the rule of reciprocity would not justify us in resorting to the same means of retaliation. A savage enemy might kill alike old men, women, and children, but no civilised power would resort to similar measures of cruelty and barbarism, under the plea that they were justified by the law of retaliation.[2]

Limitation of the rule

[1] Garden, *De la Diplomatie*, liv. vi. § 9; the 'Santa Cruz,' i. *Rob. Rep.*, p. 64.

[2] Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 2; Alison, *Hist. of Europe*, vol. ii. p. 270; Thiers, *Le Consulat et l'Empire*, liv. xvii.; Las Cases, *Mémoires de Napoléon*, vol. vii. pp. 32, 33; Martens, *Nouveau Recueil*, tome ii. p. 16; Garden, *De la Diplomatie*, liv. vi. § 9.

THE CONVENTION OF GENEVA, 1864.

This Convention was signed on behalf of Switzerland, Baden, Belgium, Denmark, Spain, France, Hesse-Darmstadt, Italy, Netherlands, Portugal, Prussia, and Würtemberg, August 22, 1864, and is now in full force. The following Powers have also acceded to it :—Argentine Republic, 1879; Austria, 1866; Bavaria, 1866; Bolivia, 1879; Bulgaria, 1884; Chili, 1879; Great Britain, 1865; Greece, 1865; Japan, 1887; Mecklenburg-Schwerin, 1865; Montenegro, 1875; Persia, 1874; Peru, 1880; the Pope, 1868; Roumania, 1874; Russia, 1867; Salvador, 1874; Saxony, 1866; Servia, 1876; Sweden and Norway, 1864; Turkey, 1865; United States, 1882.

The Articles are as follows :—

ART. I.—Ambulances and military hospitals shall be acknowledged to be neuter, and, as such, shall be protected and respected by belligerents so long as any sick or wounded may be therein.

Such neutrality shall cease if the ambulances or hospitals should be held by a military force.

ART. II.—Persons employed in hospitals and ambulances, comprising the staff for superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality, whilst so employed, and so long as there remain any wounded to bring in or to succour.

ART. III.—The persons designated in the preceding article may, even after occupation by the enemy, continue to fulfil their duties in the hospital or ambulance which they serve, or may withdraw in order to rejoin the corps to which they belong.

Under such circumstances, when these persons shall cease from their functions, they shall be delivered by the occupying army to the outposts of the enemy.

ART. IV.—As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property.

Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

ART. V.—Inhabitants of the country who may bring help to the wounded shall be respected and shall remain free. The generals of the belligerent Powers shall make it their care to inform the inhabitants of the appeal addressed to their humanity, and of the neutrality which will be the consequence of it.

Any wounded man entertained and taken care of in a house shall be considered as a protection thereto. Any inhabitant who shall have entertained wounded men in his house shall be exempted from the quartering of troops, as well as from a part of the contributions of war which may be imposed.

ART. VI.—Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong.

Commanders-in-chief shall have the power to deliver immediately to the outposts of the enemy soldiers who have been wounded in an engagement, when circumstances permit this to be done, and with the consent of both parties.

Those who are recognised, after their wounds are healed, as incapable of serving, shall be sent back to their country.

The others may also be sent back, on condition of not again bearing arms during the continuance of the war.

Evacuations, together with the persons under whose directions they take place, shall be protected by an absolute neutrality.

ART. VII.—A distinctive and uniform flag shall be adopted for hospitals, ambulances, and evacuations. It must, on every occasion, be accompanied by the national flag. An arm badge (*brassard*) shall also be allowed for individuals neutralised, but the delivery thereof shall be left to military authority.

The flag and the arm badge shall bear a red cross on a white ground. [Turkey uses a red crescent.]

ART. VIII.—The details of execution of the present convention shall be regulated by the commanders-in-chief of belligerent armies, according to the instructions of their respective Governments, and in conformity with the general principles laid down in this convention.

ART. IX.—The high contracting Powers have agreed to communicate the present convention to those Governments which have not found it convenient to send plenipotentiaries to the International Conference at Geneva, with an invitation to accede thereto; the procotcol is for that purpose left open.

ART. X.—The present convention shall be ratified and the ratifications shall be exchanged at Berne in four months, or sooner if possible.

THE ADDITIONAL ARTICLES OF 1868.

[The following additional articles were proposed and signed at Geneva on October 20, 1868, on behalf of Great Britain, Austria, Baden, Bavaria, Belgium, Denmark, France, Italy, Netherlands, North Germany, Sweden and Norway, Switzerland, Turkey, and Würtemberg. On July 22, 1870, it was stated by the Swiss Government that all those States on whose behalf the original convention had been signed had adhered to the additional articles, Rome and Spain excepted, but that Russia, whilst agreeing to the additional articles, proposed a supplement to Art. XIV., with the view of preventing the abuse to the distinguishing flag of neutrality; that it could not be expected that the ratifications of all the contracting States would be received directly, and consequently the final adoption of the additional articles could not take place till a more or less distant time; that the Federal Council of Switzerland had proposed to the North German Confederation and to France to recognise the Convention of Geneva with the additional articles during the war which had just broken out (the Franco-German war, 1870), as a *modus vivendi*, and that those Powers had readily acceded to the proposal. However, the exchange of the ratifications of these articles has not yet taken place between the contracting parties, and therefore they cannot be regarded as a treaty in full force and effect.]

ART. I.—The persons designated in Article II. of the convention shall, after the occupation by the enemy, continue to fulfil their duties, according to their wants, to the sick and wounded in the ambulance or the hospital which they serve. When they request to withdraw, the commander of the occupying troops shall fix the time of departure, which he shall only be allowed to delay for a short time in case of military necessity.

ART. II.—Arrangements will have to be made by the belligerent Powers to ensure to the neutralised person, fallen into the hands of the army of the enemy, the entire enjoyment of his salary.

ART. III.—Under the conditions provided for in Articles I. and IV. of the convention, the name ambulance applies to field hospitals and other temporary establishments, which follow the troops on the field of battle to receive the sick and wounded.

ART. IV.— In conformity with the spirit of Article V. of the convention and to the reservations contained in the protocol of 1864, it is explained that for the appointment of the charges relative to the quartering of troops, and of the contributions of war, account only shall be taken in an equitable manner of the charitable zeal displayed by the inhabitants.

ART. V.—In addition to Article VI. of the convention, it is stipulated that, with the reservation of officers whose detention might be important to the fate of arms and within the limits fixed by the second paragraph of that article, the wounded fallen into the hands of the enemy shall be sent back to their country, after they are cured, or sooner if possible, on condition, nevertheless, of not again bearing arms during the continuance of the war.

ART. VI.—The boats which, at their own risk and peril, during and after an engagement pick up the shipwrecked or wounded, or which, having picked them up, convey them on board a neutral or hospital ship, shall enjoy, until the accomplishment of their mission, the character of neutrality, as far as the circumstances of the engagement and the position of the ships engaged will permit.

The appreciation of these circumstances is entrusted to the humanity of all the combatants. The wrecked and wounded thus picked up and saved must not serve again during the continuance of the war.

ART. VII.—The religious, medical, and hospital staff of any captured vessel are declared neutral, and, on leaving the ship, may remove the articles and surgical instruments which are their private property.

ART. VIII.—The staff designated in the preceding article must continue to fulfil their functions in the captured ship, assisting in the removal of wounded made by the victorious party ; they will then be at liberty to return to their country in conformity with the second paragraph of the first additional article.

The stipulations of the second additional article are applicable to the pay and allowance of the staff.

ART. IX.—The military hospital ships remain under martial law, in all that concerns their stores ; they become the property of the captor, but the latter must not divert them from their special appropriation during the continuance of the war.

The vessels not equipped for fighting which, during peace, the Government shall have officially declared to be intended to serve as floating hospital ships, shall, however, enjoy during the war complete neutrality, both as regards stores, and also as regards their staff, provided their equipment is exclusively appropriated to the special service on which they are employed.

ART. X.—Any merchantman, to whatever nation she may belong, charged exclusively with removal of sick and wounded, is protected by neutrality, but the mere fact, noted on the ship's books, of the vessel having been visited by an enemy's cruiser renders the sick and wounded incapable of serving during the continuance of the war. The cruiser shall even have the right of putting on board an officer in order to accompany the convoy, and thus verify the good faith of the operation.

If the merchant ship also carries a cargo, her neutrality will still protect it, provided that such cargo is not of a nature to be confiscated by the belligerent.

The belligerents retain the right to interdict neutralised vessels from all communication, and from any course which they may deem prejudicial to the secresy of their operations. In urgent cases special conventions may be entered into between commanders-in-chief, in order to neutralise temporarily and in a special manner the vessels intended for the removal of the sick and wounded.

ART. XI.—Wounded or sick sailors and soldiers, when embarked, to whatever nation they may belong, shall be protected and taken care of by their captors.

Their return to their own country is subjected to the provisions of Article VI. of the convention, and of the additional Article V.

ART. XII.—The distinctive flag to be used with the national flag, in order to indicate any vessel or boat which may claim the benefits of neutrality, in virtue of the principles of this convention, is a white flag with a red cross. The belligerents may exercise in this respect any mode of verification which they may deem necessary.

Military hospital ships shall be distinguished by being painted white outside, with green strake.

ART. XIII.—The hospital ships which are equipped at the expense of the aid societies, recognised by the Governments signing this convention, and which are furnished with a commission emanating from the sovereign, who shall have given express authority for their being fitted out, and with a certificate from the proper naval authority that they have been placed under his control during their fitting out and on their final departure, and that they were then appropriated solely to the purpose of their mission, shall be considered neutral, as well as the whole of their staff. They shall be recognised and protected by the belligerents.

They shall make themselves known by hoisting, together with their national flag, the white flag with a red cross. The distinctive mark of their staff, while performing their duties, shall be an armlet of the same colours.

The outer painting of these hospital ships shall be white with red strake.

These ships shall bear aid and assistance to the wounded and wrecked belligerents without distinction of nationality.

They must take care not to interfere in any way with the movements of the combatants. During and after the battle they must do their duty at their own risk and peril.

The belligerents shall have the right of controlling and visiting them; they will be at liberty to refuse their assistance, to order them to depart, and to detain them if the exigencies of the case require such a step.

The wounded and wrecked picked up by these ships cannot be reclaimed by either of the combatants, and they will be required not to serve during the continuance of the war.

ART. XIV.—In naval wars any strong presumption that either belligerent takes advantage of the benefits of neutrality, with any other view than the interest of the sick and wounded, gives to the other belligerent, until proof to the contrary, the right of suspending the convention, as regards such belligerent.

Should this presumption become a certainty, notice may be given to such belligerent that the convention is suspended with regard to him during the whole continuance of the war.

ART. XV.—The present Act shall be drawn up in a single original copy, which shall be deposited in the Archives of the Swiss Confederation.

INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD.

General Orders, No. 100.

WAR DEPARTMENT,
Adjutant-General's Office, Washington,
April 24, 1863.

The following 'Instructions for the Government of Armies of the United States in the Field,' prepared by Francis Lieber, LL.D., and revised by a Board of Officers, of which Major-General E. A. Hitchcock is president, having been approved by the President of the United States, he commands that they be published for the information of all concerned. By order of the Secretary of War.

E. D. TOWNSEND,
Assistant Adjutant-General.

SECTION I.

Martial Law—Military Jurisdiction—Military Necessity—Retaliation.

1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the martial law of the invading or occupying army, whether any proclamation declaring martial law, or any public warning to the inhabitants, has been issued or not. Martial law is the immediate and direct effect and consequence of occupation or conquest.

The presence of a hostile army proclaims its martial law.

2. Martial law does not cease during the hostile occupation, except by special proclamation, ordered by the commander-in-chief; or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

3. Martial law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as the military necessity requires this suspension, substitution, or dictation.

The commander of the forces may proclaim that the administration of all civil and penal law shall continue, either wholly or in part, as in times of peace, unless otherwise ordered by the military authority.

4. Martial law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not martial law; it is the abuse of the power which that law confers. As martial law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honour, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

5. Martial law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed—even in the commander's own country—when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

To save the country is paramount to all other considerations.

6. All civil and penal law shall continue to take its usual course in

the enemy's places and territories under martial law, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under martial law, or continue only with the sanction, or, if deemed necessary, the participation, of the occupier or invader.

7. Martial law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

8. Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to martial law in cases of urgent necessity only; their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

9. The functions of ambassadors, ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as regards the misplaced government; but the conquering or occupying power usually recognises them as temporarily accredited to itself.

10. Martial law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the army, its safety, and the safety of its operations.

11. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting parties.

It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.

Offences to the contrary shall be severely punished, and especially so if committed by officers.

12. Whenever feasible, martial law is carried out in cases of individual offenders by military courts; but sentences of death shall be executed only with the approval of the chief executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander.

13. Military jurisdiction is of two kinds: first, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offences under the statute law must be tried in the manner therein directed; but military offences which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the 'Rules and Articles of War,' or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.

14. Military necessity, as understood by modern civilised nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of

traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy ; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another, and to God.

16. Military necessity does not admit of cruelty, that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy ; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

17. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

18. When the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

19. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilised existence that men live in political, continuous societies, forming organised units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

22. Nevertheless, as civilisation has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit.

23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection, and every disruption of family ties. Protection was, and still is with uncivilised people, the exception.

25. In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule ; privation and disturbance of private relations are the exceptions.

26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not,

the people and their civil officers owe strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

27. The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilised nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

28. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents further and further from the mitigating rules of a regular war, and by rapid steps leads them nearer to the internecine wars of savages.

29. Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

30. Ever since the formation and co-existence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defence against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honour.

SECTION II.

Public and Private Property of the Enemy—Protection of Persons, and especially Women; of Religion, the Arts and Sciences—Punishment of Crimes against the Inhabitants of Hostile Countries.

31. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

32. A victorious army, by the martial power inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the service, due, according to the existing laws of the invaded country, from one citizen, subject, or native of the same to another.

The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.

33. It is no longer considered lawful—on the contrary, it is held to be a serious breach of the law of war—to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own, and make it a portion of its own country.

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge,

whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31 ; but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places, whilst besieged or bombarded.

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality ; strictly private property ; the persons of the inhabitants, especially those of women ; and the sacredness of domestic relations. Offences to the contrary shall be rigorously punished.

This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, land, boats or ships, and churches, for temporary and military uses.

38. Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of military necessity, for the support or other benefit of the army or of the United States.

If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.

39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their office, and can continue it according to the circumstances arising out of the war—such as judges, administrative or police officers, officers of city or communal governments—are paid from the public revenue of the invaded territory, until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

40. There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

41. All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

42. Slavery, complicating and confounding the ideas of property (that is, of a *thing*), and of personalty (that is, of *humanity*), exists according to municipal or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that 'so far as the law of nature is concerned, all men are equal.' Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

43. Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the

rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or State can have, by the law of postliminy, no belligerent lien or claim of service.

44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorised officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

45. All captures and booty belong, according to the modern law of war, primarily to the government of the captor.

Prize money, whether on sea or land, can now only be claimed under local law.

46. Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offences to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offence may require; if by soldiers, they shall be punished according to the nature of the offence.

47. Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

SECTION III.

Deserters—Prisoners of War—Hostages—Booty on the Battle-field.

48. Deserters from the American army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture, or being delivered up to the American army; and if a deserter from the enemy, having taken service in the army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

49. A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising *en masse* of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

50. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.

The monarch and members of the hostile reigning family, male or

female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe-conduct granted by the captor's government, prisoners of war.

51. If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorised levy, *en masse*[1] to resist the invader, they are now treated as public enemies, and if captured are prisoners of war.

52. No belligerent has the right to declare that he will treat every captured man in arms of a levy *en masse* as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

53. The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses and servants, if they fall into the hands of the American army, are not prisoners of war, unless the commander has reason to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.

54. A hostage is a person accepted as a pledge for the fulfilment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

55. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.

56. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

57. So soon as a man is armed by a sovereign government, and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts, are no individual crimes or offences. No belligerent has a right to declare that enemies of a certain class, colour, or condition, when properly organised as soldiers, will not be treated by him as public enemies.

58. The law of nations knows of no distinction of colour, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

59. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

60. It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to

[1] 'The Prussian military code,' says Edwards (*Germans in France*), 'if it really exists in a separate and complete form, is inaccessible to the public; but may be studied all the same in the American Instructions. Mark out of them the article which under certain conditions sanctions a levy *en masse*, and substantially the two codes are identical. Incendiarism was practised in America during the civil war as a punishment, so it was also by the Prussians in 1871, but both nations seem to have a strong suspicion that the punishment is a barbarous one. It is not mentioned in the American Instructions, nor was it alluded to in the minatory proclamations put forth by the Prussians.'

declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners.

61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

64. If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

65. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

66. Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle, it be discovered that he belongs to a corps which gives no quarter.

67. The law of nations allows every sovereign government to make war upon another sovereign State, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war.

Unnecessary or revengeful destruction of life is not lawful.

69. Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

70. The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the army of the United States or is an enemy captured after having committed his misdeed.

72. Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonourable, and is prohibited.

Nevertheless, if *large* sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the surplus, after providing for their own support, appropriated for the use of the army, under the direction of the commander, unless otherwise ordered by the Government. Nor can prisoners claim as private property large sums found and captured in their train, although they had been placed in the private luggage of the prisoners.

73. All officers, when captured, must surrender their side-arms to the captor. They may be restored to the prisoner in marked cases, by the

commander, to signalise admiration of his distinguished bravery, or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored cannot wear them during captivity.

74. A prisoner of war, being a public enemy, is the prisoner of the government, and not of the captor. No ransom can be paid by a prisoner of war to his individual captor, or to any officer in command. The government alone releases captives according to rules prescribed by itself.

75. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

76. Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.

They may be required to work for the benefit of the captor's government, according to their rank and condition.

77. A prisoner of war who escapes may be shot, or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with the fellow prisoners or other persons.

78. If prisoners of war, having given no pledge, nor made any promise on their honour, forcibly or otherwise escape, and are captured again in battle, after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

79. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

80. Honourable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners, in order to extort the desired information, or to punish them for having given false information.

SECTION IV.

Partisans—Armed Enemies not belonging to the Hostile Army—Scouts—Armed Prowlers—War Rebels.

81. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

82. Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organised hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not

entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

83. Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death.

84. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army, for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

85. War rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they, if discovered and secured before their conspiracy has matured to an actual rising, or to armed violence.

SECTION V.

Safe-conduct—Spies—War Traitors—Captured Messengers—Abuse of the Flag of Truce.

86. All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

Exceptions to this rule, whether by safe-conduct, or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the government, or by the highest military authority.

Contraventions of this rule are highly punishable.

87. Ambassadors, and all other diplomatic agents of neutral powers, accredited to the enemy, may receive safe-conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe-conduct is declined. Such passes are usually given by the supreme authority of the state, and not by subordinate officers.

88. A spy is a person who secretly, in disguise or under false pretence, seeks information with the intention of communicating it to the enemy.

The spy is punishable with death by hanging by the neck, whether or not he succeed in obtaining the information or in conveying it to the enemy.

89. If a citizen of the United States obtains information in a legitimate manner, and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.

90. A traitor under the law of war, or a war traitor, is a person in a place or district under martial law who, unauthorised by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

91. The war traitor is always severely punished. If his offence consists in betraying to the enemy anything concerning the condition safety, operations or plans of the troops holding or occupying the place or district, his punishment is death.

92. If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by

the hostile army, or to the army of his government, he is a war traitor, and death is the penalty of his offence.

93. All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise.

94. No person having been forced by the enemy to serve as guide is punishable for having done so.

95. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war traitor, and shall suffer death.

96. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

97. Guides, when it is clearly proved that they have misled intentionally, may be put to death.

98. All unauthorised or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory, or foreign visitors in the same, can claim no immunity from this law. They may communicate with foreign parts, or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

99. A messenger carrying written despatches or verbal messages from one portion of the army, or from a besieged place, to another portion of the same army, or its government, if armed, and in the uniform of his army, and if captured while doing so, in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform, nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him.

100. A messenger or agent who attempts to steal through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.

101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honourable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

102. The law of war, like the criminal law regarding other offences, makes no difference on account of the difference of sexes, concerning the spy, the war traitor, or the war rebel.

103. Spies, war traitors, and war rebels are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorised by the government, or at a great distance from it, by the chief commander of the army in the field.

104. A successful spy or war traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts, as a spy or war traitor, but he may be held in closer custody as a person individually dangerous.

SECTION VI.

Exchange of Prisoners—Flags of Truce—Flags of Protection.

105. Exchanges of prisoners take place—number for number—rank for rank—wounded for wounded—with added condition for added condition—such, for instance, as not to serve for a certain period.

106. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank

as may be agreed upon by cartel, which requires the sanction of the government, or of the commander of the army in the field.

107. A prisoner of war is in honour bound truly to state to the captor his rank; and he is not to assume a lower rank than belongs to him, in order to cause a more advantageous exchange; nor a higher rank, for the purpose of obtaining better treatment.

Offences to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

108. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases, of provision, clothing, or other necessaries.

Such arrangement, however, requires the sanction of the highest authority.

109. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

A cartel is voidable so soon as either party has violated it.

110. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

111. The bearer of a flag of truce cannot insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

112. If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such a flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

113. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

114. If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offence, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

115. It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles, when hospitals are situated within the field of the engagement.

116 Honourable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared.

An honourable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit.

117. It is justly considered an act of bad faith, of infamy, or fiendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

118. The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious libraries, so that their destruction may be avoided as much as possible.

SECTION VII.

The Parole.

119. Prisoners of war may be released from captivity by exchange and, under certain circumstances, also by parole.

120. The term parole designates the pledge of individual good faith and honour to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.

121. The pledge of the parole is always an individual, but not a private, act.

122. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

123. Release of prisoners of war by exchange is the general rule; release by parole is the exception.

124. Breaking the parole is punished with death when the person breaking the parole is captured again.

Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

125. When paroles are given and received there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

126. Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

127. No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individuals giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

128. No paroling on the battle-field; no paroling of entire bodies of troops after a battle; and no dismissal of large numbers of prisoners, with a general declaration that they are paroled, is permitted, or of any value.

129. In capitulations for the surrender of strong places or fortified camps the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war, unless exchanged.

130. The usual pledge given in the parole is not to serve during the existing war, unless exchanged.

This pledge refers only to the active service in the field, against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

131. If the government does not approve of the parole, the paroled officer must return into captivity, and should the enemy refuse to receive him, he is free of his parole.

132. A belligerent government may declare, by a general order, whether it will allow paroling, and on what conditions it will allow it. Such order is communicated to the enemy.

133. No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war,

or to parole all captured officers, if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

134. The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army, and upon their failure to give it, he may arrest, confine, or detain them.

SECTION VIII.

Armistice—Capitulation.

135. An armistice is the cessation of active hostilities for a period agreed upon between belligerents. It must be agreed upon in writing, and duly ratified by the highest authorities of the contending parties.

136. If an armistice be declared, without conditions, it extends no further than to require a total cessation of hostilities along the front of both belligerents.

If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

137. An armistice may be general, and valid for all points and lines of the belligerents; or special, that is, referring to certain troops or certain localities only.

An armistice may be concluded for a definite time; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

138. The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary to a treaty of peace, or to prepare during the armistice for a more vigorous prosecution of the war, do in no way affect the character of the armistice itself.

139. An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence.

140. Commanding officers have the right to conclude armistices binding on the district over which their command extends, but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

141. It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any.

If nothing is stipulated, the intercourse remains suspended, as during actual hostilities.

142. An armistice is not a partial or temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

143. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works as much so as from attacks by main force.

But as there is a difference of opinion among martial jurists, whether the besieged have the right to repair breaches or to erect new works of defence within the place during an armistice, this point should be determined by express agreement between the parties.

144. So soon as a capitulation is signed, the capitulator has no right

to demolish, destroy, or injure the works, arms, stores, or ammunition, in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

145. When an armistice is clearly broken by one of the parties, the other party is released from all obligation to observe it.

146. Prisoners, taken in the act of breaking an armistice, must be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

147. Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice; in the latter case the war is carried on without any abatement.

SECTION IX.

Assassination.

148. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilised nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.

SECTION X.

Insurrection—Civil War—Rebellion.

149. Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

150. Civil war is war between two or more portions of a country or State, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the State are contiguous to those containing the seat of government.

151. The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions or provinces of the same who seek to throw off their allegiance to it, and set up a government of their own.

152. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

153. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of

public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife and settles the future relations between the contending parties.

154. Treating, in the field, the rebellious enemy according to the law and usages of war has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.

155. All enemies in regular war are divided into two general classes; that is to say, into combatants and non-combatants, or unarmed citizens of the hostile government.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathise with the rebellion, without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy, without being bodily forced thereto.

156. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens of the revolted portion or province, subjecting them to a stricter police than the non-combatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law and loyal to the government.

Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government have the right to decide.

157. Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops is levying war against the United States, and is therefore treason.

INSTRUCTIONS OF THE COMMANDER-IN-CHIEF OF THE ARMIES OF THE UNITED STATES (GENERAL HENRY WAGER HALLECK) TO THE COMMANDING OFFICER IN TENNESSEE, UNDER DATE OF MARCH 5, 1863.

The suggestions of General Reynolds and General Thomas, in regard to the more rigid treatment of all disloyal persons within the lines of your army, are approved. No additional instructions from these headquarters are deemed necessary. You have already been urged to procure your subsistence, forage, and means of transportation, so far as is possible, in the country occupied. This you had the right to do without any instructions. As the commanding general in the field, you have the power to enforce all the laws and usages of war, however rigid and severe these may be, unless there be some act of Congress, regulation, order, or

instruction forbidding or restricting such enforcement. As a general rule, you must be the judge where it is best to rigidly apply these laws, and where a more lenient course is of greater advantage to our cause. Distinctions, however, should always be made in regard to the character of the people in the district of country which is militarily occupied or passed over. The people of the country in which you are likely to operate may be divided into three classes :—

First, the truly loyal, who neither aid nor assist the rebels except under compulsion, but who favour or assist the Union forces. Where it can possibly be avoided, this class of persons should not be subjected to military requisitions, but should receive the protection of our arms. It may, however, sometimes be necessary to take their property, either for our own use, or to prevent its falling into the hands of the enemy. They will be paid, at the time, the value of such property, or, if that be impracticable, they will hereafter be fully indemnified. Receipts should be given for all property so taken without being paid for.

Second, those who take no active part in the war, but belong to the class known in military law as non-combatants. In a civil war like that now waged, this class is supposed to sympathise with the rebellion rather than with the Government. There can be no such thing as neutrality in a rebellion. This term is applicable only to foreign powers. Such persons, so long as they commit no hostile act, and confine themselves to their private avocations, are not to be molested by military forces ; nor is their property to be seized, except as a military necessity. They are, however, subject to forced loans and military requisitions, and their houses to be let for soldiers' quarters, and to appropriation for other temporary military uses. Subject to these impositions the non-combatant inhabitants of a district of country militarily occupied by one of the belligerents are entitled to the military protection of the occupying forces ; but while entitled to such protection they incur very serious obligations—obligations differing in some degree from those of civil allegiance, but equally binding. For example, those who rise in arms against the occupying army, or against the authority established by the same, are rebels or military traitors, and incur the penalty of death. They are not entitled to be considered as prisoners of war when captured ; their property is subject to military seizure and military confiscation. Military treason of this kind is broadly distinguished from the treason defined in the Constitutional and Statutory laws, and made punishable by the civil courts. Military treason is a military offence, punishable by the common laws of war. Again, persons belonging to such occupied territory and within the military lines of the occupying forces can give no information to the enemy of the occupying force without proper authority. To do so the party not only forfeits all claim to protection, but subjects himself, or herself, to be punished either as a spy or a military traitor, according to the character of the particular offence. Our treatment of such offences and such offenders has hitherto been altogether too lenient. A more strict enforcement of the laws of war in this respect is recommended. Such offenders should be made to understand the penalties they incur, and to know that those penalties will be rigidly enforced.

Third, those who are openly and avowedly hostile to the occupying army, but who do not bear arms against such forces. In other words, while claiming to be non-combatants, they repudiate the obligations tacitly or impliedly incurred by the other inhabitants of the occupied territory. Such persons not only incur all the obligations imposed upon other non-combatant inhabitants of the same territory, and are liable to the same punishments for offences committed, but they may be treated as prisoners of war, and be subjected to the rigours of confinement or expulsion, as non-combatant enemies. I am of opinion that such persons

should not, as a general rule, be permitted to go at large within our lines. To force those capable of bearing arms to go within the lines of the enemy adds to his effective force. To place them in confinement will require guards for their safe keeping, and this necessarily diminishes our effective forces in the field. You must determine in each particular case which course will be most advantageous. We have suffered very severely from this class, and it is time that the laws of war should be more rigorously enforced against them. A broad line of distinction must be drawn between the friends and enemies, between the loyal and disloyal.

The foregoing remarks have reference only to military statutes and to military offences under the laws of war. They are not applicable to civil offences under the Constitution and general laws of the land. The laws and usages of civilised war must be your guide in the treatment of all classes of persons of the country in which your army may operate, or which it may occupy, and you will be permitted to decide for yourself where it is best to act with rigour and where best to be more lenient. You will not be trammelled with minute instructions.

For the Declaration of St. Petersburg, 1868 (explosive bullets), see vol. i. ch. xviii. § 12.

CHAPTER XXI

ENEMY'S PROPERTY ON LAND

1. General right of war as to enemy's property—2. Distinction between movables and immovables—3. Alienation of the public domain—4. Title to property acquired during war—5. Who may become purchasers—6. Purchase by neutral Governments—7. Movable property—8. Documentary evidence of debts—9. Public archives—10. Public libraries and works of art—11. Civil structures and monuments—12. Private property on land—13. Exceptions to rule of exemption—14. Penalty for illegal acts—15. Military contributions—16. Of hostile populations—17. Property taken on field of battle or in a siege—18. Useless destruction of enemy's property—19. The right to private property—20. Captures in war—21. All booty belongs primarily to the State—22. Rule of moderation—23. Laying waste a country—24. Admiral's court—25. The English Prize Court—26. English law respecting booty.

General right of capture in war

§ 1. IT has already been stated that war, when duly declared, or officially recognised, makes legal enemies of all the individual members of the hostile States; that it also extends to property, and gives to one belligerent the right to deprive the other of everything which might add to his strength, and enable him to carry on hostilities. But this general right is subject to numerous modifications and limitations which have been introduced by custom and the positive law of nations. Thus, although by the extreme right of war all property of an enemy is deemed hostile and subject to seizure, it by no means follows that all such property is subject to appropriation or condemnation, for the positive law of nations distinguishes not only between the property of the State and that of its individual subjects, but also between that of different classes of subjects, and between different kinds of property of the same subject; and particular rules, derived from usage and the practice of nations, have been established with respect to each. We shall confine our remarks, in this chapter, to enemy's property on land.[1]

[1] Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. iv. § 8; Vattel *Droit des Gens*, liv. iii. ch. ix. § 163; Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 5;

Distinction between movables and immovables

§ 2. The captor's title to *mobilia*, or movable property, captured on land, vests in him so soon as the property is in his firm possession; but the possession of *immobilia*, or real property, only gives him a *prima facie* right to its use and products. His title or dominion over it is not complete until his conquest is confirmed, in some one of the modes prescribed by international law; meanwhile the original owner is entitled to the benefit of postliminy, which, as will be explained in chapter xxxv., obtains in some events to *mobilia* also.

Alienation of the public domain

§ 3. It has been asserted that war being but a temporary relation of nations, real property must remain *in statu quo* until after the termination of the war, when such property may revert to its former owner by the *jus postliminii*, and therefore such property can never properly be alienated by the conqueror, so long as the war continues. But this argument is erroneous. The right of a conqueror is to use or alienate the public domain of the conquered government. This principle is recognised and sustained by the general law of nations.[1]

Title to real property

§ 4. It must not, however, be inferred that the title which the purchaser acquires to the two species of property is the same. On the contrary, it is essentially different. The purchaser of movable property captured on land, acquires a perfect title as soon as the property is in the firm possession

Polson, *Law of Nations*, sec. 6; Wildman, *Int. Law*, vol. ii. p. 9; Manning, *Law of Nations*, pp. 132 et seq.; Bello, *Derecho Internacional*, pt. ii. cap. iv. § i.; Merlin, *Répertoire*, verb. 'Déclaration de Guerre;' Heffter, *Droit International*, §§ 130, 131; Hautefeuille, *Des Nations Neutres*, tit. vii. ch. i.; Kent, *Com. on Am. Law*, vol. i. pp. 110, 111.

The Germans in the war of 1870 seem to have regulated their conduct towards the French by German historical precedents, such as the invasions of 1792 and of 1814. If the campaign of 1870 was less harsh, it is to be accounted for not from any modification of the German laws of war, but by the general softening of manners during the last half-century. The war from a *military* point of view was conducted with all possible severity. Thus fortified towns—except in the case of Strasburg, where the attempt failed, and of Metz, where the system was impracticable—were reduced by the bombardment, not of the fortifications, but of the town itself. French writers before the war had declared that it would be the duty of French commanders to bombard the civil and commercial quarters of the fortified towns (*Le Spectateur Militaire*, July 1867), and the French themselves followed the example by bombarding Paris during the Commune, 1871 (Edwards, *Germans in France.*)

[1] Kluber, *Droit des Gens Mod.*, §§ 250-3; Martens, *Précis du Droit des Gens*, §§ 279-282; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. vi.; Phillimore, *On Int. Law*, vol. iii. § 90; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xii.; Isambert, *Annales Pol. et Dip.*, introd. p. 115; Kampts, *Literatur des Völkerrechts*, § 307.

of the captor ;[1] but the purchaser of any portion of the national domain of a conquered country, takes it at the risk of being evicted by the original sovereign owner, if he should be restored to the possession of his dominions. If such restoration should not take place, and the title of the conqueror should be confirmed by some one of the modes recognised by international law, the title of the purchaser is then made perfect. It was, before, a good and valid title against all, except the original sovereign owner under the *jus postliminii*, whose right is completely extinguished by a confirmation of the conquest. The conqueror cannot, of course, deny his own act, and attempt the recovery of property which he has already alienated, on the ground that the formal cession or confirmation gives him a new title. He sold the title which he acquired by the rights of conquest; a treaty of peace gives him no other title ; it simply confirms that which he already had, by depriving the former sovereign owner of the benefit of postliminy, and thus extinguishing an older adverse outstanding title.

Who may purchase

§ 5. A question here arises as to who may become the purchasers of immovable property alienated by the conqueror during military occupation, and prior to the confirmation of the conquest. The object of such alienation is, as already stated, to weaken the enemy, and to supply ourselves with the means of carrying on the war. It is evident, therefore, that the subjects of the conquered or displaced Government cannot, consistently with their duties to their own sovereign, become such purchasers. They have no right to voluntarily supply us with means for carrying on war against the Government to which they owe allegiance. By making such purchases they not only risk the loss of their purchase money on the restoration of the original sovereign to his dominions, but they expose themselves to be punished by their own Government for voluntarily furnishing the enemy with the means of prolonging the war. After the Franco-German war

[1] Where property of a citizen of an insurgent State was seized as an act of war by the officer commanding the troops of the United States in that State, and the captor, after acquiring firm possession of the property, sold it to a third person, it was held that the title of the hostile owner was extinct, at least as against the purchaser. Coolidge *v.* Gutthrie, 8 *Am. L. Reg., U.S.* 22. Capture as prize of war overrides all previous claims (the 'Battle,' 6 *Wall.*, 498).

of 1870, the French Government tried some of their subjects for this offence. If, however, the purchasers are inhabitants of the conquered territory, and their allegiance should be transferred to the new Government by the confirmation of the conquest, their title would thereby be made valid, and they themselves be free from the risk of punishment for having paid the purchase money. Subjects of the conqueror may become purchasers with no other risk than that of being evicted by the original owner on the restoration or recapture of the real property so alienated. The same may be said of foreigners, or the subjects of a neutral State. Such purchase might, however, in some cases, be deemed a hostile act, and not within the limits of legitimate trade, and not consistent with the character of neutrality, and, therefore, attach to the purchaser the character of an enemy to the displaced or conquered Power, in so much as pecuniary assistance is rendered by the purchase money paid.

Purchase by a neutral State

§ 6. Whether a neutral may make such purchases and not become a party to the war, will depend upon the character of the assistance which, by the purchase, is afforded to the conqueror, to the injury of the opposing belligerent. It is certain that if he should attempt to possess himself, during the continuance of the war, of the lands so purchased, or to maintain the title so acquired, after the restoration or recapture of the property so alienated, he would assume a hostile attitude toward the original sovereign owner and make himself a party to the war. He cannot safely purchase a conquered town or province, till the sovereign, from whom it was taken, has renounced it by a treaty of peace, or has been irretrievably subdued, or has lost his sovereignty. The original proprietor cannot forfeit his rights by the act of a third party; and if the purchaser be determined to maintain his purchase, he will find himself involved in the war. Thus, the King of Prussia became a party with the enemies of Sweden, by receiving Stettin from the hands of the King of Poland and the Czar, under the title of sequestration. But when a sovereign has, by a definitive treaty of peace, ceded a country to a conqueror, he has relinquished all the right which he had to it; and it would be absurd for him to be allowed to demand the restitution from a subsequent conqueror who wrests it from the former, or from any other prince who has

purchased it, or received it in exchange, or acquired it by any title whatsoever.[1]

Movables

§ 7. All implements of war, military and naval stores, and all *public movable* property, belonging to the hostile State, is subject to be seized and appropriated to the use of the captor. And the title to such personal or movable property is considered as lost to the original State, as soon as the captor has acquired a firm possession, which, as a general rule, is considered as taking place after the lapse of twenty-four hours; so that, immediately after the expiration of that time, it may be alienated to neutrals as indefeasible property.

Documentary evidence of debts

§ 8. We have discussed in chapter xvii. the right of a belligerent State to confiscate, on the declaration of war, debts owing by its Government, or by its subjects, to subjects of the enemy. We will now consider the right to *capture* them as the property of the enemy, found in hostile territory, by capturing the *documents* which constitute the evidence of such debts. It will be observed that this question is entirely distinct from the right to confiscate a debt, *ipso facto*, by the declaration of war. We have an example from classical history. When Alexander took the city of Thebes, he found an instrument by which it was shown that the Thessalians, who served with him, owed the Thebans an hundred talents. This instrument he gave to the Thessalians as a cancellation of their debt. On the restoration of the Thebans, they demanded the payment of the debt as still due and owing them. The case was referred to the Amphictyonic Council, and their decision is understood to have been in favour of the Thessalians. Quintilian makes a number of objections to the validity of the *gift*, by Alexander, and offers some important arguments in favour of the demand of the Thebans. To all of these objections and arguments, Puffendorf suggests answers, and opposes the demand, on the following grounds: 1st, that the seizure, being made in solemn war, was a just one; 2nd, that the right acquired by war, to a thing taken in war, is a valid title, and must be so regarded in Civil law; 3rd, that the restoration not being provided for in the treaty of peace, everything is left to the possessor as his own; 4th, that in capturing Thebes, Alexander captured the action of

[1] Vattel, *Droit des Gens*, liv. iii. ch. xiii. § 198; *Treaty of Schwedt*, October 6, 1713.

debt due to Thebes, which he might either retain himself or transfer to another; 5th, that the conquest destroyed the former body politic of Thebes, and the new commonwealth established by Cassander did not succeed to the rights of the one destroyed by Alexander; and 6th, that the Thessalians had obtained the instrument in no unjust manner, it having been given to them by one who had obtained it by the right of conquest. Jurists have generally sustained the supposed decision of the Amphictyons, on the ground of the complete conquest of Thebes, and that Alexander became the universal successor of the conquered State, but not on the ground of the mere capture of the documentary evidence of the debt. The instruments cannot be regarded as the debt, because a creditor may recover his debt, though the instruments be lost or destroyed; they are means, but not the only means of proving that it exists. It is, therefore, held that the mere fact of the conqueror possessing himself of the documents, relating to incorporeal rights, does not give to him the possession of the rights themselves; and as his rights, as derived from military force, are simply those of possession, it is not competent for him to bestow upon, or transfer to another, what he cannot physically take possession of himself.[1]

Public archives, &c.

§ 9. There is one species of movable property belonging to a belligerent State which is exempt, not only from plunder and destruction, but also from capture and conversion, viz. State papers, public archives, historical records, judicial and legal documents, and land titles. While the enemy is in possession of a town or province, he has a right to hold such papers and records, and to use them in regulating the government of his conquest; but if this conquest is recovered by the original owner during the war, or surrendered to him by the treaty of peace, they should be returned to the authorities from whom they were taken, or to their successors. Such documents adhere to the Government of the place or territory to which they belong, and should always be transferred with it. None but a barbarous and uncivilised

[1] Quintilian, *Inst. Orat.*, lib. v. cap. x.; Puffendorf, *De Jur. Nat. et Gent.*, lib. viii. cap. vi. § 23; Pfeiffer, *Das Recht der Kriegseroberung*, pp. 165–180; Brumleger, *Diss. de Occupatione Bellica*, p. 38; Phillimore, *On Int. Law*, vol. iii. §§ 561, 562; Heffter, *Droit International*, § 134; Schweikart, *Napoleon und die Kur*, pp. 74, 82; Tittman, *Ueber den Bund der Amp.*, p. 135.

enemy would ever think of destroying or withholding them. The reasons of this rule are manifest. Their destruction would not operate to promote, in any respect, the object of the war, but, on the contrary, would produce an animosity and irritation which would extend beyond the war. It would inflict an unnecessary injury upon the conquered without any benefit to the conqueror. Moreover, such archives, records, and papers often constitute the basis and evidence of private property, and their destruction would be a useless destruction of private property, and beyond the necessity of war. The same reasons apply to carrying them off and withholding them from their proper owners and legitimate use.[1]

Works of art, &c.

§ 10. Some have contended that the same rule applies to public libraries and to all monuments of art and models of taste. Certainly no belligerent would be justifiable in destroying them, except so far as their destruction might be the accidental or necessary result of military operations. But, may he not seize and appropriate to his own use such public

[1] Réal, *Science du Gouvernement*, tome v. ch. ii.; Lieber, *Political Ethics*, p. vii, § 25; Bello, *Derecho Internacional*, pt. ii. cap. iv. § 6. In the British House of Commons (February 20, 1816), Sir Samuel Romilly, speaking incidentally of this proceeding, stated, that 'it was not true that the works of art, deposited in the museum of the Louvre, had all been carried away as the spoils of war; many, and the most valuable of them, had become the property of France, by express treaty stipulations; and it was no answer to say that these treaties had been made necessary by unjust aggressions and unprincipled wars, because there would be an end of all faith between nations, if treaties were to be held not to be binding, because the wars out of which they arose were unjust, especially as there could be no competent judge to decide upon the justice of the war, but the nation itself. By whom, too, was it that this supposed act of justice, and this "great moral lesson," as it was called, had been read? By the very Powers who had, at different times, abetted France in these, her unjust wars! Among other articles carried from Paris, under the pretence of restoring them to their rightful owners, were the celebrated Corinthian Horses which had been brought from Venice; but how strange an act of justice was this to give them back their statues, but not to restore to them those far more valuable possessions, their territory and their republic, which were, at the same time, wrested from the Venetians! But the reason of this was obvious: the city and territory of Venice had been transferred to Austria by the treaty of Campo Formio, but the horses had remained the trophy of France; and Austria, whilst she was thus hypocritically reading this moral lesson to nations, not only quietly retained the rich and unjust spoils she had got, but restored these splendid works of art, not to Venice, which had been despoiled of them, the ancient, independent, republican Venice, but to Austrian Venice—to that country which, in defiance of all the principles which she pretended to be acting on, she still retained as a part of her own dominions.'

works of genius and taste as are of a movable character? This was done by the French armies in the wars which followed the revolution of 1789, but the practice was condemned by the English writers of that age. The acquisitions of the Parisian galleries and museums from the conquest of Italy were generally obtained by means of treaty stipulations, or forced contributions levied by Napoleon on the Italian princes. They are equally condemned by the English historians. It should, however, be remembered that but few of the masterpieces taken from Italy were in their original places, or in the possession of their original owners. We need hardly mention the Apollo Belvidere, the Dying Gladiator, the Venus, the Laocoon, the Bronze Horses. Major Henry Lee, an American writer of great ability, discusses this question in his 'Life of Napoleon,' and deems these forced contributions as not only justifiable by the laws of war, but as highly creditable to the conqueror, as adding grace and refinement to the warfare, and as reflecting lustre on the French arms, by harmonising the rudeness of military fame with the softer glories of taste and imagination. On the invasion of France, in 1815, the pictures, statues, and other monuments of art, collected from other countries, as spoils of war, or acquired under treaties, were seized and distributed among the allies. These objects were not the fruit of French industry, nor were they originally the property of the French nation. The allied armies entered Paris under a military convention (July 3, 1815) which they had concluded with officers of the existing Government. Article 11 of that convention determines that 'les propriétés publiques, à l'exception de celles qui ont rapport à la guerre, soit qu'elles appartiennent au Gouvernement, soit qu'elles dépendent de l'autorité municipale, seront respectées, et les Puissances alliées n'interviendront en aucune manière dans leur administration et gestion.' The Duke of Wellington says (*Disp.*, July 1815), 'I positively deny that this Article referred at all to the museums or galleries of pictures.' The French commissioners in the original draft had proposed to provide for this description of property, but Prince Blücher would not consent to it, as he said there were pictures in the gallery which had been taken from Prussia. It was finally agreed between all parties that the question of the museums and objects of art should be reserved for the

decision of the allied monarchs when they should arrive in Paris. The Duke of Wellington refers to this; writing to Blücher to prevent the destruction of the Bridge of Jena, contemplated by the latter, he says, 'Considering the bridge as a monument, I beg leave to observe that its immediate destruction is inconsistent with the promise made to the commissioners, during the negotiations of the convention, viz. that the monuments, museums, &c., should be reserved for the decision of the allied sovereigns.' Evidently the commissioners considered that the allied army had a right to the contents of the museum, and they made an attempt to save them by an Article in the convention. The claim of the allies, through the rejection of the Article, was broadly advanced. No works of native industry were demanded or seized by them.

Civil structures and monuments

§ 11. But whatever may be the decision of the question respecting the right of the conqueror to seize or levy upon such works of art and taste, belonging to the hostile State, as come under the denomination of movable or personal property, it is the modern usage, and one which has acquired the force of law, that such works cannot be wantonly, or unnecessarily, destroyed, and that all structures of a civil character, all public edifices, devoted to civil purposes only, all temples of religion, monuments of art, and repositories of science, are to be exempt from the operations of war. 'If the conqueror,' says Kent, 'makes war upon monuments of art and models of taste, he violates the modern usages of war, and is sure to meet with indignant resentment, and to be held up to the general scorn and detestation of the world.' As examples under this head, we may refer to the conduct of the British forces, in 1814, in destroying the capitol, president's house, and other civil public buildings, and the naval monument at Washington,[1] and that of Blücher, in 1815, in

[1] The naval arsenal, and a house (from whence the British troops were fired upon, after they were supposed to be in quiet possession of the city) were destroyed, and such destruction is justifiable; but the destruction of the civil public buildings can only be defended (if at all) on the ground of reprisal, the Americans having in the middle of December set fire to a town in Canada, and driven the inhabitants into the open country amidst all the severities of a Canadian winter, and having, on another occasion, when York, the capital of Upper Canada, was in their occupation, burnt the public buildings and taken possession of the private property of the governor.

destroying the ornamental trees of Paris, and planning[1] the destruction of the Bridge of Jena and the Pillar of Austerlitz.[2]

But in 1870, the Prussians considering that the operations of a siege could not fail to occupy some weeks, essayed the plan of 'simple bombardment' on Strasburg, a rich and populous city, with a feeble garrison; knowing that it would have to defend itself on the ramparts in open batteries, they thought that such a bombardment might force the inhabitants to induce the Commandant to surrender. A bombardment was kept up relentlessly for two days, during which time the famous Library and Picture Gallery and other public buildings were destroyed. The roof of the Cathedral was burnt, and the cross on the tower struck by a shell. But as this bombardment did not have the expected result, the Prussians commenced the regular siege operations, and thereupon spared the town itself as much as possible. Even then they shelled one of the towers of the Cathedral, on which the French had established an observatory.

Private property on land

§ 12. Private property on land is now, as a general rule of war, exempt from seizure or confiscation; and this general exemption extends even to cases of absolute and unqualified conquest. Even where the conquest of a country is confirmed by the unconditional relinquishment of sovereignty by the former owner, there can be no general or partial transmutation of private property, in virtue of any rights of conquest. That which belonged to the Government of the vanquished, passes to the victorious State, which also takes the place of the former sovereign, in respect to the right of eminent domain; but private rights, and private property, both movable and immovable, are, in general, unaffected by the operations of a war, whether such operations be limited to mere military occupation, or extend to complete conquest. Some modern text-writers—Hautefeuille, for example—contend

[1] The demolition of the Bridge of Jena was stopped by order of the Emperor Alexander, after the Duke of Wellington had in vain interposed.

[2] Polson, *Law of Nations*, sec. 6; Kent, *Com. on Am. Law*, vol. i. p. 93; *American State Papers*, vol. iii. pp. 693, 694; Hansard, *Parliamentary Debates*, vol. xxx. pp. 526, 527; Alison, *Hist. of Europe*, vol. iv. p. 544; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xii. In 1815 the British soldiers were forbidden to cut the trees which formed the avenues in the Bois de Boulogne, or even to tie their horses to them. (Wellington, *Dispatches*.)

for the ancient rule, that private property on land is subject to seizure and confiscation. They are undoubtedly correct with respect to the general *abstract right*, as deduced from the law of nature and ancient practice; but while the general right continues, modern usage, and the opinions of modern text-writers of the highest authority, have limited this right by establishing the rule of general exemption. The private property of a sovereign is considered in the same light as that of any other individual.[1]

General exceptions to rule of exemption

§ 13. But it must also be remembered that there are many exceptions to this rule, or rather, that the rule itself is not, by any means, absolute or universal. The general theory of war is, as heretofore stated, that all private property may be taken by the conqueror, and such was the ancient practice. But the modern usage is, not to touch private property on land, without making compensation, except in certain specified cases. These exceptions may be stated under three general heads: 1st, confiscations or seizures by way of penalty for military offences; 2nd, forced contributions for the support of the invading armies, or as an indemnity for the expenses of maintaining order, and affording protection to the conquered inhabitants; and 3rd, property taken on the field of battle, or in storming a fortress or town.

Penalty for offences

§ 14. In the *first* place, we may seize upon private property, by way of penalty for the illegal acts of individuals, or of the community to which they belong. Thus, if an individual be guilty of conduct in violation of the laws of war, we may seize and confiscate the private property of the offender. So also, if the offence attach itself to a particular community or town, all the individuals of that community or town are liable to punishment, and we may either seize upon

[1] Puffendorf, *De Jure Nat. et Gent.*, lib. viii. ch. vi. §. 20; Heffter, *Droit International*, § 133; Martens, *Précis du Droit des Gens*, § 282; Hautefeuille, *Des Nations Neutres*, tit. vii. ch. i. The Franco-Austrian campaign, 1859, affords an example of the manner in which war may be carried on without causing ruin to the surrounding country. 'Preserve,' said Napoleon III., when addressing his troops, 'that strict discipline which is the honour of the army. Here—forget it not—there are no other enemies than those who fight against you in battle;' and well was that order obeyed. On the other hand, during the American Civil War, General Sherman on his memorable march to the sea, through the Gulf States in 1864, seized private property as booty, and devastated the whole country through which he passed, but this act doubtlessly accelerated peace in a very material degree.

their property, or levy upon them a retaliatory contribution, by way of penalty. Where, however, we can discover and secure the individuals so offending, it is more just to inflict the punishment upon them only; but it is a general law of war, that communities are accountable for the acts of their individual members. This makes it the interest of all to discover the guilty persons, and to deliver them up to justice. But if these individuals are not given up, or cannot be discovered, it is usual to impose a contribution upon the civil authorities of the place where the offence is committed, and these authorities raise the amount of the contribution by a tax levied upon their constituents.[1]

Military contributions

§ 15. In the *second* place we have a right to make the enemy's country contribute to the expenses of the war. Troops, in the enemy's country, may be subsisted either by regular magazines, by forced requisitions, or by authorised pillage. It is not always politic, or even possible, to provide regular magazines for the entire supplies of an army during the active operations of a campaign. Where this cannot be done, the general is obliged either to resort to military requisitions, or to entrust their subsistence to the troops themselves. The inevitable consequences of the latter system are universal pillage, and a total relaxation of discipline; the loss of private property, and the violation of individual rights, are usually followed by the massacre of straggling parties, and the ordinary peaceful and non-combatant inhabitants are converted into bitter and implacable enemies. The system is, therefore, regarded as both impolitic and unjust, and is coming into general disuse among the most civilised nations—at least for the support of the main army. In case of small detachments, where great rapidity of motion is requisite, it sometimes becomes necessary for the troops to

[1] In 1870 the Germans levied contributions in money on many towns of France, the principle adopted by them, apparently, being that towns offering resistance, or throwing obstacles in the way of the invaders, were heavily fined, while peaceful towns were held exempt. Thus Dieppe was fined 2,000*l.* for a few shots fired from a French steamer at some Prussians. Nevertheless, some towns which had offered resistance, but which had been severely bombarded, such as Strasburg and Péronne, were spared (Edwards, *Germans in France*). There is no doubt but that the Germans were justified in levying a fine on Dieppe, but the principle of punishing an invaded town for its resistance (if the conclusion of the above writer be correct) is inconsistent with the rules of civilisation.

procure their subsistence wherever they can. In such a case, the seizure of private property becomes a necessary consequence of the military operations, and is, therefore, unavoidable. Other cases, of similar character, might be mentioned. But even in most of these special and extreme cases, provisions might be made for subsequently compensating the owners for the loss of their property.[1]

Of hostile populations

§ 16. In the invasion of the Spanish peninsula, Napoleon had to choose between methodical operations, with provisions carried in the train of his army, or purchased of the inhabitants, and regularly paid for, and irregular warfare, supplying his troops by forced requisitions and pillage. The former plan was adopted for some of the main armies, moving on prescribed lines, and the latter for the more active masses. Soult and Suchet, in favourable parts of the country, succeeded for a considerable length of time in procuring regular supplies for their armies, but most of the French generals obtained subsistence for their troops mainly by pillage. Napoleon, at St. Helena, attributed most of his disasters to the animosities thus created among the Spanish people. The Duke of Wellington, on the other hand, was adverse to requisitions, both when he was in the Peninsula and when he was in France, although they could not always be avoided. After the battle of Waterloo his army received their provisions and forage by requisition on the country, but in every case upon regular receipts by the commissioners attached to his troops; this was done not with the view of paying for what had been received, but in order to avoid abuse and plunder, and to restrict the requisition to food and forage only—both strict necessaries.[2]

Capture on the battle-field

§ 17. Upon the invasion of Mexico by the armies of the United States, in 1846, the commanding generals were, at first, instructed to abstain from appropriating private property to the public use without purchase at a fair price; but subsequently instructions of a severer character were issued. It was said by the American Secretary of War (Mr. Marcy) that an invading army had the unquestionable right to draw its supplies from the enemy without paying for them, and to

[1] Jomini, *Tableau Analytique*, ch. ii. sec. 1, art xiii.; Halleck, *Elem. Mil. Art and Science*, ch. iv. pp. 90, 91; Scott, *General Orders*, No. 358, November 25, 1847; *ibid.* No. 395, December 31, 1847.

[2] Napoleon, *Memoirs of St. Helena.* Wellington's *Dispatches*, 1815.

require contributions for its support, and to make the enemy feel the weight of the war. He further observed, that upon the liberal principles of civilised warfare, either of three modes might be pursued to obtain supplies from the enemy: *first*, to purchase them in open market at such prices as the inhabitants of the country might choose to exact; *second*, to pay the owners a fair price, without regard to what they themselves might demand, on account of the enhanced value resulting from the presence of a foreign army; and, *third*, to require them, as contributions, without paying, or engaging to pay therefor.[1] The last mode was, thereafter, to be adopted, if the general was satisfied that in that way he could get abundant supplies for his forces. There can be no doubt of the correctness of the rules of war, as here announced by the American secretary, but the resort to forced contributions for the support of our armies in a country like Mexico, under the particular circumstances of the war, would have been, at least, impolitic, if not unjust, and the American generals very properly declined to adopt, except to a very limited extent, the mode indicated. It would undoubtedly have led to innumerable insurrections and massacres, without any corresponding advantages in obtaining supplies for the American forces. General Scott wrote as follows, May 20, 1847: 'If it be expected at Washington, as is now apprehended, that the army is to support itself by forced contributions levied upon the country, we may ruin and exasperate the inhabitants and starve ourselves: for it is certain they would sooner remove or destroy the products of their farms than allow them to fall into our hands without compensation. Not a ration for man or horse would be brought in except by the bayonet, which would oblige the troops to spread themselves out many leagues to the right and left in search of subsistence, and to stop all military operations.'

Useless destruction of enemy's property

§ 18. The evils resulting from irregular requisitions and foraging for the ordinary supplies of an army are so very great, and so generally admitted, that it has become a recog-

[1] Buonaparte tried to save France from fresh taxes by making large requisitions on the enemy. In 1806, after the battle of Jena, he caused Prussia to pay upwards of a hundred million francs. After Suchet's conquest of Valencia in 1812 that country was forced to pay fifty thousand francs, together with an additional two hundred million francs for the use of the army.

nised maxim of war, that the commanding officer who permits indiscriminate pillage, and allows the taking of private property without a strict accountability, whether he be engaged in offensive or defensive operations, fails in his duty to his own Government, and violates the usages of modern warfare. It is sometimes alleged, in excuse for such conduct, that the general is unable to restrain his troops; but in the eyes of the law, there is no excuse; for he who cannot preserve order in his army, has no right to command it. In collecting military contributions, trustworthy troops should always be sent with the foragers, to prevent them from engaging in irregular and unauthorised pillage; and the party should always be accompanied by officers of the staff and administrative corps to see to the proper execution of the orders, and to report any irregularities on the part of the troops. In case any corps should engage in unauthorised pillage, due restitution should be made to the inhabitants, and the expenses of such restitution deducted from the pay and allowances of the corps by which such excess is committed. A few examples of such summary justice soon restores discipline to the army, and pacifies the inhabitants of the country or territory so occupied. But modify and restrict it as you will, the system of subsisting armies on the private property of an enemy's subjects, without compensation, is very objectionable, and almost inevitably leads to cruel and disastrous results. There is, therefore, very seldom a sufficient excuse for resorting to it. If, however, the general be left without the means of support, or if the nature of his operations prevent his carrying subsistence in the train of his army, or purchasing it in the country passed over, his conduct becomes the result of necessity, and the responsibility of his acts rests upon the Government of his State, which has failed to make proper provisions for the support of his troops, or which has required of him services which cannot be performed without injury and oppression to the inhabitants of the hostile country.[1]

[1] Manning, *Law of Nations*, p. 136; Vattel, *Droit des Gens*, liv. iii. ch. ix. § 165; Moser, *Beiträge*, &c., b. iii. § 256; Isambert, *Annales Pol. et Dip. Int.*, p. 115; Kent, *Com. on Am. Law*, vol. i. p. 92; Mr. Marcy's *Letter to Gen. Taylor*, Sept. 22, 1846; To *Gen. Scott*, April 3, 1847; *Cong. Doc.*, 30 *Cong.*, 1 *Sess.*, *Senate Ex. Doc.*, No. 1, p. 563; Scott to *Marcy*, May 20, 1847; *Cong. Doc.*, 30 *Cong.*, 1 *Sess.*, *H. R.*, *Ex. Doc.*,

§ 19. In the *third* place, private property taken from the enemy on the field of battle, in the operations of a siege, or **The right to private property**

No. 60, p. 963; Mason to *Gen. Scott*, Sept. 1, 1847; Marcy to *Gen. Scott*, Oct. 6, 1847; *Cong. Doc.*, 30 *Cong.*, 1 *Sess.*, *H. R.*, *Ex. Doc.*, No. 56, pp. 195–7; Scott, *Gen. Orders*, No. 358, Nov. 25, 1847; *ibid.* No. 395, Dec. 31, 1847.

During the occupation of Versailles by the Germans in 1870, the French mayor made frequent complaints to the Prussian Commanding General that many acts of violence were committed by the German soldiers, such as breaking into private houses and plundering or destroying the furniture, especially the clocks. In the populous part of the town order was tolerably well maintained, but not so in the outskirts. These complaints do not appear to have obtained any favourable results (Delerot, *Versailles*). During this war the French sometimes took away the municipal papers of a town, in order that, should the town fall into the hands of the enemy, the latter might not be able to ascertain the taxation, or, consequently, be able to know how large a requisition the town might bear (Russell, *Diary of Last War*). The Prussians on entering French towns or villages billeted their troops on the inhabitants, writing in chalk on the door of each house the number of soldiers to be provided for within. When there was time for doing things in an orderly manner, requisitions were addressed to the mayor, and by him given out to private individuals; it was for the person executing the requisitions to obtain payment from the mayor, who generally did pay in whole or in part out of the local funds, looking, on behalf of his commune, to the State for future indemnification. Requisitions were issued for every imaginable thing. Horseshoes were constantly the object of requisitions, and on the great lines of march blacksmiths were everywhere impressed into the Prussian service.

Although, according to Bluntschli, invaders are entitled to claim from the invaded lodging, food, and drink, fuel, clothing, and carriage, the Prussians did not, as a rule, call upon the enemy to provide clothing for them; a quantity of cloth was requisitioned at Elbœuf, Louviers, and other towns; boots and socks were sometimes requisitioned, and late in the campaign, horses were very frequently demanded. In theory nothing was taken for which a receipt was not given, but this rule often broke down in practice. An idea got abroad that the Germans would, on the conclusion of peace, redeem the requisition papers. This supposition may have had its origin in the fact that during the invasion of 1792 the requisitions issued by the Duke of Brunswick were in the name of Louis XVI., and not, as during the above war, in that of German generals, or of commanders of detached corps. These officials alone possessed the right to issue requisitions (Edwards, *Germans in France*). The requisitions, made daily, by the Germans, while in occupation of Versailles, were as follows:—120,000 loaves of bread, 80,000 pounds of meat, 90,000 pounds of oats, 27,000 pounds of rice, 7,000 pounds of roasted coffee, 4,000 pounds of salt, 20,000 litres of wine, and 500,000 cigars. Other requisitions were made as required. In theory none was to be made unless the demand was in writing, but the French complain that verbal requisitions were often made. Further, they say that although every written demand should have borne the *visa* of the German general commanding the place, the *visa* was not placed on by him, but at his office, by under-officers or soldiers. These granted it to the first comer, and thereby a great disadvantage was caused to the invaded, for every refusal to comply with a requisition became, not a refusal to the bearer, but a refusal to the Commander-in-Chief (Delerot, *Versailles*). Requisitions were also levied by the French troops on their own countrymen.

in the storming of a place which refuses to capitulate, is usually regarded as legitimate spoils of war. The right to private property, taken in such cases, must be distinguished from the right to permit the unrestricted sacking of private houses, the promiscuous pillage of private property, and the murder of unresisting inhabitants. In other words, we must distinguish between the *title* to property acquired by the laws of war, and the *accidental circumstances* accompanying the acquisition. Thus, the right of prize in maritime captures, and of land in conquests, may be good and valid titles, although such acquisitions are sometimes attended with cruelty and outrage on the part of the captors and conquerors. So with respect to the right of booty acquired in battle or assault; the acquisition may be valid by the laws of war, although other laws of the same code may have been violated by the general or his soldiers in the operations of the campaign or siege.

Captures in war

§ 20. Towns, forts, lands, and all immovable property taken from an enemy are called *conquests*; captures made on the high seas are called *prize*; movables taken on land are called *booty*. All captures in war, whether conquests, prize, or booty, naturally belong to the State in whose name and by whose authority they are made. It alone has such claims against the enemy as will authorise the seizure and conversion of his property; the forces who make the seizures are merely the instruments of the State, employed for this purpose; they do not act on their individual responsibility, or for their individual benefit. They, therefore, have no other claim to the booty or prize which they may take than their Government may see fit to allow them. The amount of this allowance is fixed by the municipal laws of each State, and is different in different countries.[1]

Edwards (*Germans in France*) gives an example of this. Five places in the Department of the Orne claimed 11,000 francs for requisitions levied on them by francs-tireurs in a regular manner, and 16,000 francs for requisitions levied in an 'irregular' manner.

In a march of twenty-two miles in an enemy's territory in the Ile de la Passe, the British, under Captain Willoughby, abstained from pillaging the least article of property. Even the sugar and coffee laid aside for exportation, and usually considered as legitimate objects of seizure, remained untouched; and the invaders, when they quitted the shore for their ship, left behind them not merely a high character for gallantry but also for rigid adherence to promises (James, *Nav. Hist.*, vol. v. 278).

[1] Bello, *Derecho Internacional*, pt. ii. cap. iv. § 4; Heffter, *Droit International*, §§ 135, 136; Kent, *Com. on Am. Law*, vol. i. p. 101; Horne *v.* Earl Camden, 2 *H. Black. Rep.*, p. 533.

All booty belongs primarily to the State

§ 21. Among the Romans, the soldier was obliged to bring into the public stock all the booty he had taken. This the general caused to be sold, and after distributing a part of the produce of such sale among the soldiers according to their rank, he consigned the residue to the public treasury. It is the general practice in modern times, under the laws and ordinances of the belligerent Governments, to distribute the proceeds, or at least a part of the proceeds, of captured property among the captors, as a reward for bravery and a stimulus to exertion. In France the prize ordinances fully provide for such distribution. The Naval Prize Act, 1864 (27 and 28 Vict., c. 25),[1] regulates prize in Great Britain, while the Act of Congress[2] of June 30, 1864, c. 174, provides similarly in the United States. When captures are not granted away, they accrue to the use of the Government. This is the principle of International Law, with regard both to booty and to prize; but in some States the municipal law creates a difference.[3]

Rule of moderation

§ 22. While there is some uncertainty as to the exact limit, fixed by the voluntary law of nations, to our right to appropriate to our own use the property of an enemy, or to subject it to military contributions, there is no doubt whatever respecting its waste and useless destruction. This is forbidden alike by the law of nature and the rules of war. But if such destruction is necessary in order to cripple the

[1] This expressly declares that nothing therein shall give to the officers and men of any of her Majesty's ships of war, any right or claim in or to any ship or goods taken as prize, or the proceeds thereof, it being the intent of that Act that such officers and crew shall continue to take only such interest (if any) in the proceeds of prizes as may be from time to time granted to them by the Crown. A royal proclamation usually directs that the net produce of every prize taken by vessels of war (except when acting in conjunction with the army, in which case the distribution is reserved to the Crown) shall be for the entire benefit of the officers and crew making such capture, after the same shall have been adjudged lawful prize. The Crown formerly used to reserve to itself a share in all prizes made by privateers. The Prize Act (55 Geo. III., c. 160, now expired) conferred on the owners of privateers all prizes made by them.

[2] This directs that the net proceeds of all property condemned as prize shall, when the prize is of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and that when of inferior force, one half shall be decreed to the United States and the other half to the captors. Provided that in case of privateers and letters of marque the whole shall be decreed to the captors, unless it shall be otherwise provided in the commissions issued to such vessels.

[3] Brymer *v.* Atkins, 1 *H. Blacks. Rep.*, pp. 189–91; Cross et al. *v.* Harrison, 16 *Howard Rep.*, p. 164; Cross, *Military Laws*, p. 116.

operations of the enemy, or to insure our own success, it is justifiable. Thus, if we cannot bring off a captured vessel, we may sink or burn it in order to prevent its falling into the enemy's hands; but we cannot do this in mere wantonness. We may destroy provisions and forage, in order to cut off the enemy's subsistence; but we cannot destroy vines and cut down fruit trees, without being looked upon as savage barbarians. We may demolish fortresses, ramparts, and all structures solely devoted to the purposes of war; but, as already stated, we cannot destroy public or private edifices of a civil character, temples of religion, and monuments of art, unless their destruction should become necessary in the operations of a siege, or in order to prevent their affording a lodgment or protection to the enemy.[1]

Laying waste a country

§ 23. There are numerous instances in military history where whole districts of country have been totally ravaged and laid waste. Such operations have sometimes been defended on the ground of necessity, or as a means of preventing greater evils. It was on this ground that Italy and Spain justified their destruction of the maritime towns on the coast of Africa, which had become mere nests of pirates. But the sacking of towns and villages, and delivering them up to a prey to fire and the sword, are terrible remedies, which are often worse than the evil to be removed. 'Dreadful extremities,' says Vattel, 'even when we are forced into them; savage and monstrous excesses, when committed without necessity.' Another excuse for ravaging a district of country, is to render it a barrier against the advance of an enemy. Thus, the Czar, Peter the Great, laid waste an extent of fourscore leagues of his own territory, to check the advance of Charles XII., of Sweden. The victory of Pultowa was claimed as the result of this sacrifice. Again, in 1812, the Russians laid waste a vast extent of country, and burnt their capital, to prevent its affording a shelter to the French from the rigours of a Polar winter. The disastrous retreat from Moscow was claimed as the fruit of this circum-

[1] Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. vii.; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. xii. In 1799 General Brune declared to the Duke of York that it would be contrary to the laws of war for the latter to destroy the dykes in Holland and inundate that country, if such act would not be beneficial to his own forces or detrimental to those of the enemy.

spection. Such violent remedies are to be sparingly applied; there must be reasons of suitable importance to justify the use of them. A prince who should, without necessity, imitate the Czar's conduct, would be guilty of a crime against his people; and he who does the like in an enemy's country, when impelled by no necessity, or induced by feeble reasons, becomes the scourge of mankind. Cicero condemns the conduct of his countrymen in destroying Corinth, to avenge the unworthy treatment offered to the Roman ambassadors, because Rome was able to assert the dignity of her ministers, without proceeding to such extreme rigour.[1]

The Admiral's Court

§ 24. An English *court of admiralty* does not, merely of its own inherent powers, exercise jurisdiction of questions of *booty*, or of captures made on land by military forces, without the presence and co-operation of ships or their crews. The Federal courts of the United States have never decided directly upon their jurisdiction of such a question, but from the similarity of English and American admiralty and prize jurisdictions, and the opinion of the court in the case of the 'Emulous,' there is little doubt but that their prize courts are limited, in this respect, the same as those of England. It has also been decided in England that a municipal court has no jurisdiction of cases of hostile seizure; moreover, that the circumstance of the place where the seizure was made, being in the undisputed possession of British power, with a provisional government and organised courts of justice, did not alter the character of the transaction. Wildman remarks: 'There is no instance in history or law, ancient or modern, of any question, before any legal judicature, ever having existed about it [booty] in this kingdom. It is often given to the soldiers on the spot, or wrongfully taken by them, contrary to discipline. If there is any dispute it is regulated by the commander-in-chief.' As such questions do not come within the jurisdiction of either courts of Admiralty or of law, they must be taken cognisance of by the military tribunals, and be governed by military laws and regulations, and by the laws of war.[2]

[1] Vattel, *Droit des Gens*, liv. iii. ch. viii. § 142; ch. ix. §§ 166–72; Martens, *Précis du Droit des Gens*, § 280; Kluber, *Droit des Gens Mod.*, §§ 262-65; Phillimore, *On Int. Law*, vol. iii. § 50; Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 6.

[2] Le Caux *v.* Eden, 2 *Doug. Rep.*, p. 594; 'The Two Friends,' 1 *Rob. Rep.*, p. 225; the 'Emulous,' 1 *Gallis Rep.*, p. 563.

The English Prize Court

§ 25. In speaking of the constitution, authority, and functions of the English prize court, and of the wisely formed and admirably developed code of Admiralty jurisdiction and rules of procedure, Sir Robert Phillimore remarks: 'It is not surprising that, in great maritime kingdoms, the jurisdiction of the Admiral's court should have thrown into the shade the tribunal of the general. But, that the latter should have left such faint traces of its origin and mode of procedure, and should so soon have fallen into desuetude, is a very remarkable fact in the history of jurisprudence.' Mr. Knapp, in a learned note to his report of the great case of the Army of the Deccan, argued before the Privy Council, in 1833, has shown the error of the dicta of Lord Mansfield, in Lindo *v.* Rodney, repeated in the foregoing extract from Wildman, that, 'there is no instance in history or law, ancient or modern, of any question ever having existed respecting booty taken in a continental land war, before any legal judicature in this kingdom.' It appears from this note of Mr. Knapp, that in very early times, in England, causes respecting booty were determined in the court of chivalry, before the constable and marshal.[1]

English law respecting booty

§ 26. As no action can be maintained in an English court of *municipal* law with respect to booty, and as courts of *admiralty* had no jurisdiction of the matter, the inquiry arises, what became of this jurisdiction when it ceased to be exercised by the court of the constable and marshal?[2] All booty, as

[1] Phillimore, *On Int. Law*, vol. iii. § 127; Lindo *v.* Rodney, *Douglas Rep.*, p. 593; Army of the Deccan, 2 *Knapp Rep.*, pp. 149–51; Oldis *v.* Donmille, *Show. Parl. Cas.*, p. 58; Banda and Kirwee Booty, 1 *Law R.* (Adm.), 109; Sir James Scarlett, Attorney-General, 1 *Knapp Rep.*, p. 357; Elphinstone *v.* Bedreechund, 1 *Knapp Rep.*, pp. 360–1; the 'Buenos Aires,' 1 *Dod. Rep.*, p. 29; and see *supra*, vol. i. p. 546.

[2] Lord Hale says 'that there is no evidence on record of any Admiralty jurisdiction till the time of Edward III., and asks where the jurisdiction in matters maritime was exercised during all this intermission of Admiralty courts. He answers to this question, 'A very great part thereof, especially touching capture of ships and goods arrested and taken by way of reprisal, was transacted *coram consilio regis* and in Chancery' (*Hargrave Manuscripts*, No. 137, ff. 118–26). It is certain that original jurisdiction was exercised by the Privy Council in a case which arose out of the captures at Toulon by land and sea forces in 1793; a grant had been made to the navy, but the army concerned in the expedition presented a memorial to the king that the warrant might be recalled, and another issued granting them a share for their co-operation. This memorial was referred to a committee of the Privy Council, who heard the case argued before them by counsel for the army and navy, and finally advised the King not to recall his warrant. Similar jurisdiction was exercised by the Privy Council in the case of the captures at Seringapatam.

before remarked, belongs to the Crown, and is captured under the authority of the Crown. The Crown must, therefore, ultimately decide upon the legality of the capture and the distribution of the booty. The mode in which it now exercises this jurisdiction is to refer the claims of those who petition for a share in the distribution to the Lords of the Treasury, who lay down the principles which are to govern the case, and a board of trustees are appointed under the royal sign-manual warrant to ascertain, collect, and distribute the booty according to the scheme which has been approved and sanctioned by the Crown.[1] By 3 and 4 Will. IV., c. 41 (1833), the Privy Council are authorised to hear or consider any matter referred to them by the Crown, and to advise thereon; and 3 and 4 Vict., c. 65 (1840), and 24 and 25 Vict., c. 10, extend the jurisdiction of the High Court of Admiralty to all matters and questions concerning *booty of war*, or the distribution thereof, which it shall please the Crown, by the advice of the Privy Council, to refer to the judgment of the said court, and in all matters so referred the court shall proceed as in the case of *prize of war*, and the judgment of the court shall be binding upon all parties concerned. It therefore appears that, although an English prize court, as such, has no jurisdiction of cases of booty, the High Court of Admiralty may decide such matters and questions concerning booty as shall be referred to it by the Crown with the advice of the Privy Council.

[1] The 'Elsebe,' 5 *Rob.*, 173; Nicholl *v.* Goodhall, 10 *Ves.*, 156; Alexander *v.* Duke of Wellington, 2 *Russ. and Mylne*, 35. The warrant for distribution is a mere direction from the Crown, like the order from a customer to his banker; it vests no property in the objects of the Crown's bounty until the money has been actually paid to them under it.

CHAPTER XXII

ENEMY'S PROPERTY ON THE HIGH SEAS

1. Distinction between enemy's property on land and on the high seas—2. Opinions of Mably and others—3. Difficulties in its application—4. Ownership at time of capture—5. Rule as to consignee—6. Doctrine in the United States Courts—7. Contract and shipment made in contemplation of war—8. Contract made in peace and shipment in war—9. If both be made in time of peace—10. Shipment, with risk on neutral consignee—11. If neutral consignor become an enemy during voyage—12. Acceptance *in transitu* by neutral consignee—13. Change of ownership by stoppage *in transitu*—14. National character of goods—15. Transfer of enemy's ships to neutrals—16. Rules of such transfer—17. Character of ships and goods, how deduced—18. Effect of secret liens—19. Documentary proofs of ownership—20. Laws of different States—21. Decisions of French prize courts—22. Exemption of vessels of discovery—23. Of fishing boats—24. In case of shipwreck, &c.—25. Distinction between reprisals and privateering—26. Privateers not used in recent wars—27. Declaration of the Conference of Paris, 1856—28. How received by other States—29. Privateers, by whom commissioned—30. Treaty stipulations respecting privateers.

No relaxation of ancient rules as to maritime captures

§ 1. WHILE 'the progress of civilisation has slowly but constantly tended to soften the extreme severity of the operations of war by land,' says Wheaton, 'it still remains unrelaxed in respect to maritime warfare, in which the private property of the enemy, taken at sea or afloat in port, is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and by sea, has been justified by alleging the usage of considering private property, when captured in cities taken by storm, as booty; and the well-known fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property belonging to the inhabitants; and that the object of wars by land being conquest, or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the victor for those who are to be his subjects, naturally restrains him from the exercise of his extreme rights in this particular; whereas the object of

maritime war is the destruction of the enemy's commerce and navigation, the sources and sinews of his naval power, which object can only be attained by the capture and confiscation of private property.'[1]

Attempts to modify it

§ 2. Several of the ablest Continental writers oppose this distinction on principle. The Abbé Mably[2] advocated an entire freedom of commercial intercourse in war, even between the subjects of the belligerent powers; and Emerigon, yielding to the arguments of the Abbé, expresses an earnest desire that the laws of war may be modified or changed accordingly. Others, again, think that the change should extend only to the adoption of the principle that private property on the high seas should be subject to the same rules in war as private property on land; without any modification of the law of war respecting the commercial intercourse of subjects of the belligerent powers. Napoleon I., in his 'Mémoires,' dictated at St. Helena, says: 'Il est à désirer qu'un temps vienne, où les mêmes idées libérales s'étendent sur la guerre de mer, et que les armées navales de deux puissances puissent se battre sans donner lieu à la confiscation des navires marchands, et sans faire constituer prisonniers de guerre de simples matelots de commerce.' The great advantages which England, by means of her naval superiority, has derived from the capture of private property upon the high seas, have tended very much to the maintenance of the rigour of the ancient rule of commercial warfare. The contrary theory has been advocated by the United States, who proposed to add to the first article of the 'Declaration concerning maritime law,' made by the Conference of Paris, April 16, 1856, the following words: 'and the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband.' This proposition,[3] although favourably received,

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 7. Property captured on land by a naval force of the United States is not a 'maritime prize,' even though it may have been a proper subject of capture generally. Alexander's Cotton (2 *Wall.*, 404), and see Act of March 3, 1863, 12 *Stat. at L.*, 820; Act of July 2, 1864, 13 *Stat. at L.*, 375.

[2] Mably, *Droit Public*, ch. xii. p. 308; Napoleon, *Mémoires*, tome iii. ch. vi.

[3] This proposition can be well illustrated by assuming the accomplishment of the proposed change, the realisation of the ideal which the reformers have conceived; that is, contest between combatants alone, while all else in the State goes on as usual. A war is declared between

was not adopted by the powers represented at that conference, Russia alone excepted. Mr. Fish made a similar suggestion to Baron Gerolt in 1870. Italy in 1865, Austria and Prussia in 1866, and Prussia, again, in 1870, showed themselves to be in favour of this doctrine; but there is no good reason why the right of capture of private property at sea should ever be abandoned. It may therefore be stated as the existing and established law of nations, that, when two powers are at war, they have a right to make prize of the ships, goods, and effects of each other upon the high seas; and that this right of capture includes not only government property, but also the private property of all citizens and subjects of the belligerent powers, and of their allies. Whatever bears the character of enemy's property (with a few exceptions to be hereafter noticed), if found upon the ocean, or afloat in port, is liable to capture as a lawful prize by the opposite belligerent.[1]

Difficulties in its application

§ 3. War establishes very different relations between parties, from those which exist in the ordinary transactions

two powerful maritime nations. It produces no direct change in the peaceful avocations of life; agriculture, manufactures, commerce, flourish as before. The people are not hindered in their productions and exchanges, and are thus enabled to respond to the demands of the Government, and to furnish all the material supplies necessary to sustain the struggle. It is true that producers are withdrawn from time to time from the orderly activities of life and are converted into military non-producers. But the vacancy thus made is not felt, because the articles which were before produced at home are now brought from abroad, by means of the free commerce which is thus quickened into extraordinary activity. Under these circumstances the war is reduced to a mere duel between hostile armies. The nation has only to furnish men, and the contest will be continued until one country has been swept of its able-bodied citizens. That nation will certainly be victorious which can bring forward and sacrifice the greatest number of soldiers. This is not an imaginary picture. The essential fact was shown to be true in the history of the Confederacy. Levy after levy was made, army after army took the field; but as soon as Sherman ravaged the sources of supply in Georgia and Carolina, the whole hostile array collapsed.—*North American Review*, No. 235, p. 405.

[1] Pistoye et Duverdy, *Des Prises*, tit. i. ch. i.; Hautefeuille, *Des Nations Neutres*, tit. vii. ch. i.; Wheaton, *On Captures*, App., p. 317; Polson, *Law of Nations*, § 6; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. caps. xii. xiii.; Martens, *Précis du Droit des Gens*, § 28; Ortolan, *Diplomatie de la Mer*, liv. iii. ch. ii.; Jouffroy, *Droit Maritime*, p. 57 et seq.; Pando, *Derecho Púb. Int.*, p. 412; Wildman, *Int. Law*, vol. ii. p. 118 et seq.; Manning, *Law of Nations*, p. 136; Dalloz, *Répertoire*, verb. 'Prises Maritimes;' Azuni, *Droit Maritime*, tome ii. ch. iv.; Marcy, *Letter to Count Sartiges*, July 28, 1856; De Cussy, *Précis Historique*, ch. xii.; Gardner, *Institutes*, ch. xv.

of trade and pacific intercourse, and from those new relations arise new duties and new obligations. Hence the rules which govern the decisions of prize courts, under the law of nations, with respect to the ownership of property, widely differ, in many respects, from those which obtain in time of peace in the courts of civil or common law. This renders necessary a special examination of the law of prizes, and the investigation of many nice and refined distinctions in the application of that law.[1]

Ownership at time of capture

§ 4. For example, the legality or illegality of the capture of goods upon the high seas, will frequently turn upon the question of ownership at the time of capture; for when property is shipped from a neutral country to an enemy's, or from an enemy's country to a neutral, the question of its national character, whether it is neutral or hostile, can only be determined by ascertaining whether the right of property, at the time of shipment, was vested in the shipper or in the consignee. If, in order to determine this question, we were to refer only to the rules established by courts of civil and common law, we should be liable to form an erroneous conclusion, as these rules differ in some respects from those which govern courts of prize, while, in others, they are precisely the same in all courts.[2]

[1] Duer, *On Insurance*, vol. i. pp. 420, 421; Kent, *Com. on Am. Law*, vol. i. p. 74; Bello, *Derecho Internacional*, pt. ii. cap. v. § 1; Heffter, *Droit International*, § 139; Merlin, *Répertoire*, verb. 'Prise Maritime;' Massé, *Droit Commercial*, liv. ii.

[2] It was determined, by the Privy Council, in 1857, that the sale of a ship, absolutely and *bonâ fide*, by an enemy to a neutral *imminente bello*, or even *flagrante bello*, is not illegal. A Russian subject, immediately before the war between Russia and England, 1854, sold, absolutely and *bonâ fide*, a ship, the 'Ariel,' to a subject of a neutral State. Part only of the purchase money was paid at the time of the purchase, the remainder being agreed to be paid out of the earnings of the ship. Before all the stipulated price was paid, the ship was seized, in a British port, as a prize; and was condemned, by the High Court of Admiralty, on the ground that the enemy's interest in the ship was not divested, as the residue of the purchase money was to be paid out of the earnings. This condemnation was reversed by the Privy Council, because the non-payment of part of the purchase money did not create a lien on the freight and ship, in favour of the seller, so as to render the ship, in possession of a neutral owner, liable to seizure by a belligerent. Liens, whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral ship, are equally to be disregarded in a British Prize Court. There were six other vessels seized, all belonging to the same appellant. After the delivery of the above judgment, the Crown officers restored these vessels, with the exception of one, the 'Bellica,' which they retained on the ground that the sale of that ship was distinguishable

Rule as to consignee

§ 5. The general rule of law, both international and civil, or common, is, that goods in the course of transportation from one place to another, if they are shipped on account and at the risk of the consignee, in consequence of a prior order or purchase are considered as his goods during the voyage. The master of a ship, who receives goods, that, by the bill of lading, are expressed to be, and, in fact, are, shipped on account of the consignee, becomes, by the very act the agent of that consignee, so that the delivery to him has the same effect in vesting the property, as a delivery to his principal. Hence, goods *in transitu* from a neutral country to a belligerent, if they are to be delivered to and to become the property of a belligerent immediately on their arrival, are considered as his goods during the voyage, *in itinere*, and subject to capture and confiscation.[1] This general rule, as to the effect of a delivery of goods, to the master, for a foreign purchaser, may, both by the civil and common law,

from the others, her sale having taken place *in transitu*. On appeal, again, to the Privy Council, that court decided that the sale, though *in transitu*, was valid, as the *transitus* had ceased when the vessel had come into possession of the purchaser, which took place before the seizure, and that no distinction could be made between the case of that vessel and the case of the 'Ariel.' (Sorensen *v.* Reg., 11 Moore, *Privy Council Cas.*, 119.)

[1] In 1793 an American ship, the 'Sally,' shipped a cargo of corn of a firm at Baltimore, ostensibly for the account and risk of a firm of Philadelphia (but in reality for the use of the French Republic), and consigned to them or their assigns, and to be delivered at Havre. The form of contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities between France and England. On the ship being captured by the English, the master, instead of supporting the contents of his bill of lading, deposed 'that on arrival, the goods would become the property of the French Government,' and concealed papers strongly supporting his testimony. It was held that as the corn was to become the property of the enemy on delivery, *capture* might be considered as *delivery*. Captors by the right of war stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as if they were enemy's property. (The 'Sally,' 3 *Rob.*, 300, note. See, also, the 'Anna Catharina,' 4 *Rob.*, 107; and the 'Carl Walter,' *ibid.* 207.) Condemnation was also made in the case of the property of British merchants, shipped before the war with Spain, but in a Spanish character and in a trade so exclusively peculiar to Spanish subjects as that no foreign name could appear in it (the 'Princesa Zavala,' 2 *Rob.*, 52), and further in that of an asserted American merchant, who, having gone to France to collect outstanding debts, had invested part of the money so received in sending a cargo of butter to Lisbon. The peculiar circumstances in each case were such as to invest the consignors with an enemy national character *pro hac vice*. (The 'Drie Gebroeders,' 4 *Rob.*, 232.)

As against captors the ownership of property cannot be changed while it is *in transitu*. (The 'Sally Magee,' 3 *Wall.*, 451.)

be varied by an express stipulation between the parties, or by the usage of a particular trade. If the parties agree that the payment for the goods shall be contingent upon their actual delivery at the foreign port, the whole risk of the voyage being cast upon the shipper, and the contract of sale, until a delivery, being incomplete and executory, the goods, during the voyage, in judgment of law, remain the property of the shipper. So if the prevailing usage of a particular trade casts the risk upon the consignor, the delivery to the master is not regarded, in law, as a delivery to the consignee; for such a usage presupposes the general agreement of the merchants engaged in the trade to which it refers. But neither of these exceptions to the general rule, that the delivery to the master, as the agent of the consignee, is a delivery to the principal, is admitted in courts of prize, for the very conclusive reason, that, to permit goods, in time of war, to be considered the property of the neutral consignor, instead of the enemy consignee, merely on the ground that the former had assumed the risk of transportation, would at once put an end to captures of enemy's property on the high seas. On every contemplation of a war, in the consignments of goods from neutral ports to an enemy's country, the risk of transportation would be laid on the consignor, and the right of capture would be completely frustrated. Hence, says Sir William Scott, that part of the contract laying the risk of transportation, in time of war, upon the neutral consignor, is invalid; or rather as the captor has all the rights which belong to the enemy, his taking possession is considered equivalent to an actual delivery to the enemy consignee. The foregoing rule of the prize courts of England, that property consigned to, and to become the property of an enemy, upon arrival, cannot be protected by the neutrality of the shipper, has been explicitly recognised and acted upon by the prize courts of the United States, and approved by American writers of the highest authority.

Doctrine in the United States Courts

§ 6. No case directly in point has yet been decided by the Supreme Court of the United States, but the doctrine has been affirmed in analogous cases, resting substantially on the same grounds; and Mr. Justice Story, in the United States circuit court, says, 'that in time of war property shall not be permitted to change character in its transit, nor shall property

consigned to become the property of an enemy upon its arrival, be protected by the neutrality of the shipper. Such contracts, however valid in time of peace, are considered, if made in war, or in contemplation of war, as infringements of belligerent rights, and calculated to introduce the grossest frauds. In fact, if they could prevail, not a single bale of enemy's goods would ever be found upon the ocean.' Chancellor Kent, in his commentaries, says, that 'property shipped from a neutral to the enemy's country, under a contract to become the property of the enemy on arrival, may be taken, *in transitu*, as enemy's property; for capture is considered as delivery. The captor, by the rights of war, stands in the place of the enemy. The prize courts will not allow the neutral and belligerent, by a special agreement, to change the ordinary rule of peace, by which goods ordered and delivered to the master, are considered as delivered to the consignee. All such agreements are held to be constitutionally fraudulent, and, if they would operate, they would go to cover all belligerent property while passing between a belligerent and a neutral country; since the risk of capture would be laid alternately on the consignor or consignee, as the neutral factor should happen to stand in one or other of these relations.' A contrary doctrine has been held by the courts of the State of New York, but as the decisions of State courts are not of authority in questions of prize, the rule, as decided by Justice Story, must be regarded as established in the United States.[1]

Contract and shipment made in contemplation of war

§ 7. This rule is not confined to cases where the contract and shipment are made in time of actual war. If they are made in time of peace, but in contemplation of war, and with the manifest intention of protecting the property from hostile capture, they are equally a fraud upon the belligerent power to which the right of capture belongs; and the reasons for the rule of the prize courts, in cases of contract made in time of actual war, given by Sir William Scott and Justice Story, in their decisions, and by Chancellor Kent, in his commen-

[1] Kent, *Com. on Am. Law*, vol. i. pp. 86, 87; the 'Ann Green,' 1 *Gallis R.*, 291; the 'Francis,' 1 *Gallis R.*, 450; Ludlow *v.* Browne, *Johns. R.*, 1; De Wolf *v.* N.Y. Ins. Co., 20 *Johns. R.*, 214; the 'Venus,' 8 *Cranch.*, 253, 275; the 'Merrimack,' 8 *Cranch.*, 317, 327; the 'Mary and Susan,' 1 *Wheaton R.*, 25; the 'San José Indiano,' 1 *Wheaton R.*, 208, 212; the 'Francis,' 8 *Cranch.*, 183; Ilsley *v.* Stubbs, 9 *Mass. R.*, 65; Chandler *v.* Sprague, 5 *Met. R.*, 306.

taries, are equally applicable to contracts made in time of peace, but in contemplation of war. We do not, however, find any decision directly on this point; but the view of this question taken by Mr. Duer seems to be fully sustained by the reasoning of the courts in the cases to which reference is made in the foregoing paragraph. If goods contracted for, and shipped in time of actual war, are liable to capture on the ground of *fraud* upon the rights of a belligerent, assuredly the same would, for the same reason, apply to the same transactions made with the same intention, in contemplation of war.[1]

Contract made in peace and shipment in war

§ 8. And if the contract is made during a peace, and not in contemplation of war, but the shipment be made after hostilities have commenced, and with a knowledge of the war, the private agreement of the parties, by which the neutral consignor assumes the risk of delivery, will not be permitted to affect the rights of the capturing belligerent. For it was the duty of the consignor, and within his power in this case, equally as in the former, to guard himself from a contingent loss arising from capture, by requiring a proper security from the consignee. Without such security, he was not bound to make the shipment at all, since, as the contract was not made in expectation of a war, so material a change in its risks, as contemplated by the parties in making the contract, would absolve him from its execution.[2]

If both be made in time of peace

§ 9. But where the shipment of the goods, as well as the contract, laying the risk on the neutral consignor, are both made in time of peace, and not in contemplation of war, the legal ownership which was in the consignor, at the inception of the voyage, remains in him until its termination. The property of the consignor is not divested in favour of a belligerent, by the breaking out of the war, before the arrival of the goods, by which the foreign consignee becomes an enemy. The same rule applies where the consignor, at whose risk the shipment was made, is a subject of the belligerent captor, the reason of the exemption being equally applicable to his case. Again, if the contract and shipment be made in time of peace, and not in contemplation of war, and the risk be laid on the

[1] Duer, *On Insurance*, vol. i. p. 478.

[2] Wildman, *Int. Law*, vol. ii. p. 99; the 'Packet de Bilboa,' 2 *Rob.*, 133.

neutral consignee, the property being in the consignee, not only by the rules of the civil and common law, but also by the law of nations, the goods are exempt from capture. So, also, if the consignee be a subject of the belligerent captor, for the delivery to the carrier is regarded as the delivery to the consignee, and the goods are neither enemy's goods, nor goods in unlawful trade with the enemy. Both the contract and shipment were lawfully made, and no rule of war being violated by the subject in acquiring the ownership of the property, or in their removal from the country, then friendly but now hostile, the character of the goods is not changed during the voyage, and they are, therefore, not liable to condemnation.[1]

Shipment at risk of neutral consignee

§ 10. And, again, where the goods are shipped by an enemy consignor, during the war, and under a prior sale, or an unconditional contract of sale, the property so shipped vests absolutely in the neutral consignee, by delivery to the master, and, if otherwise innocent, and the title remains unchanged, it is exempted from capture during the voyage. The reason is obvious: the neutral violates no duties toward one belligerent by trade, otherwise lawful, with the opposing belligerent; and the only question is that of ownership, which, by the supposition, is in the neutral consignee. But, as a neutral cover is the common device by which belligerent interests are sought to be protected, shipments of this character are watched with peculiar jealousy, and the clearest evidence of ownership in the consignee is not unreasonably required. 'It is not sufficient,' says Mr. Duer, 'to establish the title, that the bills of lading and the invoice are in the name of the consignee, and express the shipment to be made on his account and risk; for these documents are indispensable to give even the *appearance* of neutral ownership. It must be shown by what means the title was acquired. If it is alleged that the goods had been paid for, the payment must be proved. If the goods are claimed under a contract of sale, containing provisions for future payment, or under an order for their shipment, the contract, or order, must be produced, and must appear to be absolute and unconditional, so as to bind the consignee positively to the acceptance of the goods, and to take from the consignor any right or power

[1] Wildman, *Int. Law*, vol. ii. pp. 99, 100; the 'Atlas,' 3 *Rob.*, 299.

to reclaim them (unless in the sole event of the insolvency of the consignee) previous to their arrival. If any election is given to the consignee, or any power of direction or control is retained by the consignor, the goods continue, in the judgment of law, the property of the consignor, and, as such, are liable to capture during the voyage. This doctrine has been clearly established in the British Courts of Admiralty, and affirmed by the Supreme Court of the United States. It may be well to illustrate this doctrine by particular cases. Thus, where an American merchant had ordered certain goods from Holland, then at war with England, and the Dutch merchant, instead of sending the goods to him directly, shipped them on his own account to a third person, and directed his correspondent not to deliver over the bill of lading unless payment was provided for in a satisfactory manner, it was held that the goods, which were captured on the voyage, remain the property of the consignor, and as such were liable to condemnation. So, where the goods were shipped under a positive order from the claimant, but the shippers, with a view to their own security, had the bill of lading altered so as to be transferable to their own order, Sir William Scott held that the goods, being still under the dominion of the shipper, and subject to his control, the ownership was not legally changed, and upon this ground condemned the cargo as the property of the enemy shipper.[1]

If neutral consignor become an enemy during voyage

§ 11. The same considerations apply where the shipment is made in time of peace by a neutral consignor who becomes an enemy before the completion of the voyage, although there does not, perhaps, exist the same grounds of suspicion as when the consignor is an enemy at the time of shipment. Nevertheless, the courts, even in this case, require the clearest evidence of neutral ownership. This is illustrated by the case of the 'Francis.'[2] Shortly previous to the breaking out of the war between Great Britain and the United States, in 1812, a merchant in Glasgow shipped several bales of goods to certain merchants in New York, and both the bill of lading and the invoice were in the names of the latter, and expressed

[1] Duer, *On Insurance*, vol. i. pp. 427, 428; the 'Aurora,' 4 *Rob.*, 219; the 'Noydt Gedacht,' 2 *Rob.*, 13, note; the 'Josephine,' 4 *Rob.*, 25; the 'Carolina,' 1 *Rob.*, 304; the 'Merrimack,' 8 *Cranch.*, 328; the 'Venus,' 8 *Cranch.*, 275.

[2] 8 *Cranch.*, 354.

the shipment to be on their *account and risk*. It appeared, however, by a letter found on board, that the consignor, in making the shipment, had exceeded the order, so that the consignees were in effect released from any obligation to accept the goods, and by this letter he gave them an election to take the whole of the shipment, or none, as they pleased. The goods were captured on the voyage, after war had been declared, by an American privateer, and were condemned as enemy's property. In another case of the same kind, during the same war, the bill of lading expressed the goods to be shipped by a house in Liverpool, unto and on account of certain merchants in New York, and the invoice, signed by a manufacturer in Manchester, described the goods to be consigned to the claimants, but did not specify on whose *account and risk*. And in a letter to the consignees enclosing the invoice, he said 'the goods are to be sold on joint account, or on mine alone.' The goods were accordingly condemned as the property of the shipper.

Acceptance in transitu by neutral consignee

§ 12. Where goods are shipped by an enemy consignor to a neutral consignee, not under a prior order, but with the expectation that they will be received on the terms proposed, if they are in fact accepted by the consignee previous to the capture, it was held, by Sir William Scott, that his acceptance vests and perfects his title, and that, upon proof of the fact, the property will be restored. To exempt the property from capture, however, the acceptance must be absolute and unconditional. The transaction is then construed in the same manner as if the goods had been originally shipped on his account and at his risk. The same point had previously been raised in the Supreme Court of the United States, but as the acceptance in the case decided was partial and conditional, the Court expressly declined to consider what would have been the effect had the acceptance been absolute.[1]

Change of ownership by stoppage in transitu

§ 13. Every consignor, not only at common law, but by a rule of the general mercantile law, has, in certain cases, a control over the shipment, which is technically called *a right of stoppage in transitu*; that is, a right to countermand the bill of lading, and repossess himself of the goods, at any time after their shipment and before their arrival at their destined

[1] Kent, *Com. on Am. Law*, vol. i. p. 87; the 'Cousine Marianne,' 1 *Edw. Rep.*, p. 346.

port. The only case in which this right of stoppage *in transitu* can be legally exercised, under the laws of war, is, in the expectation, confirmed by the event, of the insolvency of the consignee. If the consignee, previous to the arrival of the goods, communicate to the consignor his determination not to receive or pay for the goods, these facts are deemed equivalent to actual insolvency. But a revocation of the consignment, from fears of the insolvency of the consignee, which are not confirmed by the event, is not deemed sufficient to change the ownership. The effect of this right, when duly exercised, is to save the property from its liability to capture, where the consignment is made from a neutral to an enemy; and to incur that liability, where the consignment is made from an enemy to a neutral.[1]

National character of goods

§ 14. But these cases are properly exceptions to the general and well-settled rule of the English Admiralty, that, in time of war, the national character of property cannot be changed by a transfer to a neutral during the transportation. That which was enemy's property at the commencement of the voyage, remains liable to capture, until its arrival at the port of destination. Nor is the application of the rule confined to a transfer in actual war. If it appear that the immediate motive of the transfer, although made in time of peace, was the expectation of war, and that this fact was known to the purchaser, the contract is held to be equally invalid, as against the belligerent whose right of capture was meant to be evaded. 'These rights, however,' says Mr. Duer, 'are an apparent difference in the mode of applying the rule in these cases. In the latter, positive evidence of the intentions of the parties is plainly required; but, in the first, the fact of a transfer is regarded as conclusive proof of the intended fraud.' This doctrine seems to have been adopted in its full extent by the Supreme Court of the United States. The rule of Admiralty, in these and other cases which we have mentioned, is different from that of common law, and its vindication is rested on the ground that its adoption is necessary to the prevention of fraud. A change in the national character of the owner, during the voyage, is not allowed to

[1] Emerigon, *Traité des Assurances*, ch. xi. § 3; the 'Constancia,' 6 *Rob.*, 324, 333; 'Twende Venner,' 6 *Rob.*, 326, note; Ellis *v.* Hunt, 3 *Term R.*, 469; Oppenheim *v.* Russell, 3 *Bos. and Pull.*, 484; Dutton *v.* Soloman, 3 *Bos. and Pull.*, 582; Coxe *v.* Harden, 4 *East*, 211.

change the hostile character of property *in transitu*. If he was an enemy at the commencement of the voyage, the property is condemned, notwithstanding he may have become a subject of the capturing power previous to the capture. A Dutch ship, owned and claimed by merchants residing at the Cape of Good Hope, was captured on a voyage from Batavia to Holland, nearly two months after the inhabitants of the Cape of Good Hope, under the capitulation, had sworn allegiance to the British Crown, and had become British subjects. Their ship was condemned, on the sole ground that, 'having sailed as a Dutch ship, her character during the voyage could not be changed.' The propriety of this decision has been seriously questioned. Although the character of property is not permitted to be varied *in transitu*, from hostile to friendly, or neutral, so as to exempt it from capture and confiscation, nevertheless, if it be neutral or friendly at the commencement of the voyage, its character may be so effectually altered before its termination as to ensure its condemnation. As a general rule, no matter what its character at the commencement of the voyage, if its owner is an enemy at the time of the capture, the seizure is lawful and confiscation a necessary consequence. Its fate is determined by the real or constructive character of its ownership at the time of seizure; by its real character, if hostile at the time of capture, and by its constructive character, if neutral or friendly when seized, but hostile at the commencement of the voyage. The rights of the captors are vested at the time of the seizure, and cannot be divested by any subsequent change in the national character of the owner. Previous to adjudication, the owner may have become a neutral, an ally, or a subject, but in neither capacity can he claim exemption from confiscation of property seized while he was an enemy. Nor, to warrant a condemnation, is it in all cases necessary that the owner should be an actual enemy at the time of capture. If the seizure is provisionally made in contemplation of hostilities, a subsequent declaration of war has a retroactive effect, converting the neutral or friendly owner into a public enemy, and the precautionary seizure into an act of war. The seizure is at first regarded as provisional, or rather an act of an equivocal character, to be determined by subsequent events. If, in the language of Sir William Scott, the dispute

terminates in a reconciliation, the seizure is regarded as a mere civil embargo; but if war follow, it impresses upon the original seizure a direct hostile character.[1] But this particular point has been discussed in chapter xvii.

Transfer of enemy's ships to neutrals

§ 15. The transfer, in time of war, of the vessel of an enemy to a neutral, is a transaction, from its very nature, liable to strong suspicion, and consequently is examined with a jealous and sharp vigilance, and subjected to rules of a peculiar strictness in the prize court of the opposite belligerent. Nevertheless, neutrals have a right to make such purchases of merchant vessels, when they act with good faith, and, consequently, the belligerent powers are not justified, by the law of nations, in attempting to prohibit such transfers by a sweeping interdiction, as was done in former years by both the French and English governments. Ordinances of this character form no part of the law of nations, and, consequently, are not binding upon the prize courts, even of the country by which they are issued. Nevertheless, where the sale is claimed to have been made by an enemy to a neutral, in time of war, it is not unreasonable that its motives, nature, and terms should be an object of the most searching inquiry. The temptation to fraud, in such cases, is so great that the entire transaction should be most strictly examined, otherwise the opposing belligerent might be deprived of his just rights of capture. Hence courts of admiralty have established very severe rules respecting such transfers.[2]

[1] The 'Danckebaar Africaan,' 1 *Rob.*, 107; Duer, *On Insurance*, vol. i. pp. 441–444; Phillimore, *On Int. Law*, vol. iii. § 21; Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 4; the 'Bodes Lust,' 5 *Rob.*, 233–250; the 'Diana,' 5 *Rob.*, 60; Wildman, *Int. Law*, vol. ii. pp. 101, 102.

[2] Abreu, *Tratado de las Presas*, cap. v. § 3; Pouget, *Droit Maritime*, tome i. p. 459; Wheaton, *On Captures*, appen., p. 386; Hautefeuille, *Droit des Nations Neutres*, tit. xi. ch. ii.; Cushing, *Opinions of U.S. Attys.-Genl.*, vol. vi. p. 638. An enemy's vessel ostensibly transferred to a neutral, but continuing in the enemy's trade, manned by subjects of the enemy, and sailing from and to an enemy's port, was condemned. (The 'Embden,' 1 *Rob.*, 13.) The sale of a ship of the enemy's to a neutral must be absolute and *bonâ fide*. Any equity of redemption or other defeasance will be considered to keep the title still in the enemy. (The 'Sechs Geschwistern,' 4 *Rob.*, 100.) A vessel purchased in the enemy's country continually employed in the trade of that country during war, and evidently on account of the war, was deemed to be a ship of that country. (The 'Vigilantia,' 1 *Rob.*, 13.) In the case of the purchase of an enemy's vessel by a neutral, it appearing that the asserted neutral was a person then resident in the enemy's country, it was held that the presumption was that he was there *animo manendi*,, and that the proof lay on the claimant to explain it (the 'Bernon,' 1 *Rob.*, 102). A vessel, sold in a

Rules of such transfer

§ 16. These rules may be briefly stated as follows: the sale of an enemy's vessel to a neutral purchaser, to be valid, must, in all cases, be absolute and unconditional. The title and interest of the vendor must be completely and absolutely divested. If there is any covenant, condition, agreement, or even tacit understanding, by which he retains any portion of his interest, the entire contract is vitiated, and, in international law, regarded as void. Thus, if the vendee is bound by a condition to restore the vessel at the conclusion of the war; or, if the vendor retains a lien upon the vessel, for the whole or a part of the purchase money, the transfer is held to be colourable and void. Even where the sale is ostensibly absolute, if the vessel continues under the control and management of her former owner, and in the same trade and navigation in which she was previously employed, these circumstances are deemed conclusive evidence of a fraudulent intent to cover, under the name of a neutral, the property of an enemy, and the contract is necessarily adjudged to be invalid.[1] So,

blockaded port by a neutral, who had himself purchased of the enemy since the commencement of hostilities, was taken coming out of that port, and was condemned (the 'Vigilantia,' *Reyt.*, 6 *Rob.*, 122). A British ship was fictitiously transferred to Russian merchants, to prevent her seizure by the Russian authorities, while lying ice-bound in a Russian port, at the outbreak of the Crimean war, 1854. She was seized as Russian property, by the customs officers, on her arrival at Leith. The Prize Court was of opinion, that the case presented very considerable difficulties, of a perfectly novel character, for if the vessel was not restored to the claimants, there was no alternative but to condemn her to the Crown. And how? not as taken by a non-commissioned captor, but—following the case of 'Etrusco' (Lords of Appeal, 11 August, 1803)—to the Crown, for a violation of the British law. This the Court could not do: 1st, because there was no proof of a violation of British law, which, by British law, would entail a condemnation; 2ndly, because there had been no intention to commit a *malâ fide* act, in violation of British law; lastly, because the whole transaction was a deception on the British Customs for the purpose of protecting British property, not for the purpose of deceiving British authorities, nor with the intention of violating British law, but for rescuing property supposed to be in the grasp of the enemy. The Court, however, expressed considerable doubt whether this course of proceeding on the part of the claimant, even for a laudable purpose, was quite correct. (The 'Ocean Bride,' Spinks, *Pri. Cas.*, 66.) See also the 'Benedict,' Spinks, *Pri. Cas.*, 314, a case of the *bonâ fide* transfer from an enemy to a neutral, and Sorensen *v.* Reg., *supra*, § 4. The interest or expectancy of creditors in enemy property arrested as prize, even though amounting to a lien upon it, does not exempt it from capture as prize. (The 'Mary Clifton,' *Blatchf. Pr. Cas.*, 556.)

[1] A vessel, belonging to a Russian, sailed from Cronstadt with a cargo of wheat on May 17, 1854, bound to Leith, where she arrived in June, and was there seized by the customs officers. She was said to have been transferred, by virtue of a power of attorney, to a Dane at Messina, then

also, if the neutral vendee, although residing himself in a neutral country, continues to employ the vessel constantly in the trade of the country to which she belonged, she is as thoroughly incorporated in a hostile commerce, as if she had never been transferred. The inference from these circumstances is not to be resisted, that the sole object of the transfer was to enable the vessel to carry on the enemy's trade without a liability, and, consequently, that the sale was collusive, and a meditated fraud upon belligerent rights. But, in these cases, condemnation would follow from the hostile character impressed upon the vessel by the trade in which she is employed, even if the transfer were to be considered as in itself valid. If, says Sir William Scott, a neutral chooses to engage himself in the trade of a belligerent nation, he must be content to bear all the consequences of the speculation; if he confines himself exclusively to the trade and navigation of an enemy's country, he is liable to be considered an enemy, in respect to the vessel so employed. If a merchant vessel of an enemy shelters itself from hostile pursuit in a neutral port, and, on account of the difficulty or impossibility of escape, is there sold, it has been contended that such sale is a violation of belligerent rights; but the purchase of a neutral, under such circumstances, if *bonâ fide*, is considered valid, and sustained by courts of prize. But not so with respect to the purchase of an enemy's ship of war, under like circumstances,

resold by virtue of another power of attorney to her master while at Copenhagen, in the course of her voyage. She was condemned by the English Prize Court as never having been *bonâ fide* transferred. It was held, that the Court looks rather for the natural evidence of a transaction, such as correspondence, than for formal documents, and that the Court can restore to the claimant only in the character in which he claims, and that the onus of full and complete proof lies upon such claimant. The master had made an affidavit, after the capture, stating that he had taken on board his cargo on May 14; this he had done with the evident intention of bringing his vessel within the protection of a certain Order in Council, which would not have protected him had he named the real date. Dr. Lushington observed that, not only had the claimant failed to prove his claim, but that even if the proof of ownership had been more stringent, he was not satisfied that he could have restored the property to the master, as entitled to a Danish character. If a man chooses to clothe himself fictitiously with a Danish character, and attempts to get restitution under that pretence, and is detected by the Court, it is not very consistent with law or justice, that he should then be entitled to turn round, and say, 'I played the rogue; I tried to persuade you I was a Dane, but I am in reality a Russian. Give me the benefit of that Order in Council which I should have been entitled to, if I had acted as an honest man.' (The 'Soglasie,' 2 *Spinks*, 101.)

for it is held that neutrals cannot purchase ships of war from either of the belligerents. It has been held by the British courts of prize, that a ship cannot change her character *in transitu*, and that a transfer to a neutral, notwithstanding the *bona fides* of the transaction, will not exempt her from capture and condemnation. This doctrine is sustained by the *dicta* of Mr. Justice Story, in the 'Ann Green' and the 'Francis,' but the question has not been directly decided in our courts. It therefore remains a debatable point with us. Such is a summary of the rules adopted by the British prize courts with respect to the transfer of ships during the war, from one of the belligerents to a neutral. So far as they conform to the rules of evidence and logical proof, established by the practice and consent of the nations of Christendom, they are obligatory, and can neither be resisted nor disputed. But, beyond this, they have no force as rules of international law. For no belligerent nation can impose upon a neutral its regulations, nor dictate to such neutral unusual rules of evidence, or arbitrary means of proof. In other words, if a neutral, who has purchased a vessel from a belligerent, holds such vessel by a title valid by the law of nations, he cannot be deprived of it by a prize court, because he does not prove his ownership according to the arbitrary and unusual rules of evidence which that court may adopt. If the sale be valid, it cannot be annulled by any rules which a belligerent nation may see fit to prescribe for itself, but which, by the law of nations, are not obligatory upon neutrals.[1]

General rule as to character of ships and goods

§ 17. It follows, from the rules of decision heretofore announced, that the character of property on the high seas, whether vessels or goods, results, as a general rule, from the character of their owners, or those who are regarded in international law as the owners. If such owners are hostile, friendly or neutral, according to the particular rules of law applicable to the state of war, their property is, in general,

[1] The 'Ann Green,' 1 *Gal.*, 289; Wildman, *Int. Law*, vol. ii. pp. 84 et seq.; Phillimore, *On Int. Law*, vol. iii. p. 448; Duer, *On Insurance*, vol. i. pp. 446-448; Kluber, *Droit des Gens*, § 234; Rayneval, *Droit de la Nat. et des Gens*, liv. iii. chs. xiv. xv.; the 'Noydt Gedacht,' 2 *Rob.*, 137, note; the 'Sechs Geschwistern,' 4 *Rob.*, 100; the 'Vigilantia,' 1 *Rob.*, Embden,' 1 *Rob.*, 16; the 'Jemmy,' 4 *Rob.*, 31; the 'Argo,' 1 *Rob.*, 'Vrow Hermina,' 1 *Rob.*, 163; the 'Endraught,' 1 *Rob.*, 18, 19; erva,' 6 *Rob.*, 396, 399; the 'Omnibus,' 6 *Rob.*, 71; the 'Packet ,' 2 *Rob.*, 133.

to be considered hostile, friendly or neutral, and, as such, is subject to, or exempt from, capture.[1] The laws of war applicable to ownership are, as before remarked, different from those which apply in time of peace, and hence what, by the latter, would be considered the property of a neutral, will not unfrequently, by the former, be regarded as the property of an enemy. But there are numerous exceptions to this general rule, that the character of property on the high seas results from that of its owner, for the property of neutrals, subjects, and allies, is not unfrequently impressed with a hostile character from the circumstances of its locality, use, &c. Thus, ships are deemed to belong to the country under whose *flag* and *pass* they sail; at least, this circumstance is conclusive, as against the party who takes the benefit of them, although they do not bind *other parties*, as against him. So, a ship belonging to a neutral owner may acquire a hostile character from the trade in which she engages, or some particular act which she may do. The same may be said with respect to proprietary interests in cargoes, although, in general, goods have the same national character as their owners; yet they sometimes have impressed on them a hostile character while their owners are friendly or neutral, sometimes from their origin, character, or use, and sometimes from the acts of their owners, of the ship in which they are carried, or of the master in charge of them.[2] These questions were discussed in chapter xii.

§ 18. In determining the national character of property,

[1] A cargo was purchased and shipped in Holland, when at war with Great Britain, on board a neutral vessel; on it being proved by the bill of lading and other papers to be the property of a merchant in Hamburg, then in neutrality, it was held not liable to condemnation as prize. O'Neale, *v.* Cordes and Gronemeyer (1805), 13 *F.* c. 221.

If a British ship, captured by an enemy, is afterwards purchased by a British subject, she is still, in the contemplation of the law of England, the property of the person from whom she was captured (Woodward *v.* Larking, 3 *Esp.*, 286; the 'Reward,' *Hay and Mar.*, 197). The 55 Geo. III., c. 160, § 5, now expired, enacted that if any British ship, taken as prize by the enemy, be set forth for war by the enemy, it shall, on being recaptured by British subjects, be condemned as prize to the recaptors. See cases, the 'Horatio,' 6 *Rob.*, 320; 'L'Actif,' *Edwards*, 185; the 'Ceylon,' 1 *Dods.*, 114; the 'Georgiana,' *ibid.* 401.

[2] The 'Vrow Anna Catharina,' 5 *Rob.*, 161; the 'Magnus,' 1 *Rob.*, 31; the 'Fortuna,' 1 *Dod. R.*, 87; the 'Success,' 1 *Dod. R.*, 131; the 'Princesa,' 2 *Rob.*, 49; the 'Anna Catherina,' 4 *Rob.*, 107; the 'Rendsborg,' 4 *Rob.*, 121; the 'Commercen,' 1 *Wheaton R.*, 382; the 'Phœnix,' 5 *Rob.*, 20; the 'Drie Gebroeders,' 4 *Rob.*, 232; the 'Industrie,' *Spinks R.*, 444.

Effect of liens

courts of prize generally look only to the legal title; and when, from the papers, the right of property in a captured ship or cargo appears to be vested in an enemy, no equitable or secret liens of a neutral or a subject can be made the foundation of a claim to defeat or vary the rights of the captors. The only exception to this rule, is where the lien is immediately and visibly incumbent upon the property, and consequently, is one which the party claiming its benefit has the means of enforcing without resort to legal process. Of such a nature is the freight due to the owner of the ship, for the ship-owner has the cargo in his possession, subject to his demand of freight money, by the general law, independent of any contract. The distinction between the two classes of liens is properly expressed in the language of the civil law, by regarding one as a *jus ad rem*, and the other as a *jus in re*.[1]

Documentary proofs of ownership

§ 19. It is stated by Wheaton that a *certificate of registry*[2] is the proof naturally to be looked to for the national character of the ship in addition to the following proofs:— 1st, the *Passport*, or *Sea Letter*. This is a permission from the neutral State to the master of the vessel to proceed on the intended voyage, and usually contains his name and residence, the name, description, and destination of the vessel, with such other matter as the local law and practice require. 2nd, the *Muster Roll*, or *Rôle d'Equipage*, containing the names, ages, quality, and national character of every one of the ship's company. 3rd, the *Charter Party*; if the vessel has been let to hire. 4th, the *Bills of Lading*, by which the master

A great distinction has always been made, by the nations of Europe, between ships and goods. Some countries went so far as to make the flag and pass of a ship conclusive on the cargo also, but the Courts of Great Britain never carried the principle to that extent. They held *the ship* to be bound by the character imposed on it, by the authority of that Government from which all the documents issue, but that *goods*, which have no such dependence upon the authority of the State, may be differently considered. As to whether the Courts will make the separation, it may be said, that in time of peace such separations will generally be made, but in time of war a more strict principle may become necessary. See the 'Elizabeth' (5 *Rob.*, 2), and *post.*, ch. xxiii. § 19, the distinction drawn by the Supreme Court of the U.S. between that case and the 'Julia' (8 *Cranch.*, 181).

[1] The 'San José Indiano,' 2 *Gallis R.*, 284; the 'Frances,' 18 *Cranch.*, 418; the 'Tobago,' 5 *Rob.*, 218; the 'Marianna,' 6 *Rob.*, 24.

[2] The case of Le Cheminant *v.* Pearson, 4 *Taunt.*, 367, decides that a register is not a document recognised by the law of nations.

acknowledges the receipt of the goods specified therein, and promises to deliver to the consignee or his order. 5th, the *Invoices*, which contain the particulars and prices of each parcel of the goods, with a statement of the charges thereon. 6th, the *Log-book*, or ship's *Journal*, which contains an accurate account of the vessel's course, with a short history of the occurrences during the voyage. 'As the whole of these papers may be fabricated,' says Wheaton, their 'presence does not necessarily imply a fair case; neither does the absence of any of them furnish a conclusive ground of condemnation, as has been most unjustly provided by the ordinances of certain belligerent powers. As they furnish presumptive evidence only of the property in the vessel and cargo belonging to those to whom it purports to belong; so, on the other hand, their absence[1] affords only presumptive evidence of the existence of enemy interests, which may be rebutted by other proof of a positive nature, accounting for the want of them, and supplying their place, according to the circumstances of each particular case.' At one period it was customary for the United States to issue sea letters and certificates of ownership to vessels owned by American citizens, whether entitled or not to registry and enrolment. But, since the Acts of March 26 and June 30, 1810, these particular documents were not often issued. With respect to ships which have been transferred abroad, *a bill of sale* is the proper evidence of ownership. 'A bill of sale,' says Lord Stowell, 'is the proper title to which the maritime courts of all countries would look. It is the universal instrument of the transfer of ships in the usage of all maritime countries.'[2]

A Bill of Health, or certificate properly authenticated,

[1] If it be clearly evident that a vessel, although without papers, is neutral, her detention by a ship of war is not justifiable, but in the absence of that clear evidence, a ship of war is justified in detaining a ship when *the more important* papers of the latter are wanting; the same, if those papers are irregular or inconsistent with each other, or with the statements of the master (the 'Sarah,' 3 *Rob.*, 330; the 'Anna,' 5 *Rob.*, 383; 'Nuestra Signora de Piedade,' 6 *Rob.*, 43. As to regularity of papers, false papers, and spoliation, see *post.*, chaps. xxiii. and xxvii.; as to endorsement of a ship's papers, see the 'Hendrick and Maria,' 1 *Rob.*, 82, and 4 *Rob.*, 53; as to marking of load line on British ships, see 39 and 40 Vict., c. 80.

[2] Kent, *Com. on Am. Law*, vol. i. p. 130; Wheaton, *On Captures*, pp. 65, 66; Duer, *On Insurance*, vol. i. pp. 550, 551; the 'Sisters,' 5 *Rob.*, 155; the 'Pizarro,' 2 *Wheaton R.*, 227; the 'Amiable Isabella,' 6 *Wheaton R.*, 1; the 'Nereide,' 9 *Cranch.*, 388.

that the ship comes from a place where no contagious distemper prevails, and that none of the crew, at the time of her departure, were infected with such distemper, is to be found among the papers of the ships of many nations.[1]

The following list, extracted from the excellent 'Manual of Naval Prize Law' of Sir Godfrey Lushington, K.C.B., specifies what are the various papers in addition to the custom house clearance, the manifest of cargo, and the bills of lading which may usually, although not necessarily, be found on board the vessels of the principal Maritime States, viz.:—*Austria.*—Scontrino ministeriale (certificate of registry). Patente sovrana (royal license). Giornale di navigazione (official log-book). Scartafaccio, giornale di navigazione cotidiano (ship's log-book). Charter party, if vessel is chartered. Ruolo dell' equipaggio (list of crew). Bill of health. *Denmark.*—Royal passport, in Latin, with translation (available only for the voyage for which it is issued, unless renewed

In the treaties which were from time to time made with the different States of Barbary (see vol. i. pp. 274 and 445), it was agreed that the subjects of Great Britain should pass the seas unmolested by the corsairs of those States; and for ascertaining what ships belonged to British subjects it was provided that they should produce a pass under the seal of the Admiralty of Great Britain. In pursuance of these treaties passes were made out at the Admiralty in the following form:—'By the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c. Suffer the [schooner "Perseverance," of Exeter, as described in the annexed certificate of registry] to pass with her company, passengers, goods, and merchandise, without any let, hindrance, seizure, or molestation, the said ship appearing unto us by good testimony to belong to the subjects of his Majesty. Given under our hands and the seal of office of Admiralty the [twenty-fourth] day of [September] in the year of our Lord one thousand eight hundred [and thirty-three]. To all persons whom these may concern. By command of their Lordships, [signed] John Barrow.' It will be noticed that the pass contains very few words. It was written on parchment, with ornaments at the top, through which a scolloped indenture was made. The scolloped tops were sent to Barbary, and, being put into the hands of the corsairs, the commanders of them were instructed to suffer all persons to pass who had passes that would fit these scolloped tops. These passes were used in the trade to the East Indies, Africa, the Levant, Spain, Italy, and to every part of the Mediterranean; from the particular need of them in the latter they obtained the name of *Mediterranean passes.* They were granted to none but to British-built ships, or ships made free, navigated with a master and three-fourths of the mariners British subjects, or foreign Protestants made denizens. Each pass bore an impressed five-shilling stamp. Rules to govern Mediterranean passes were made by Order in Council in 1722. They are referred to in 6 Geo. IV., c. 110, s. 36, and in 3 and 4 Will. IV., c. 55, s. 6. By 4 Geo. II., c. 18, it is felony to forge or counterfeit a Mediterranean pass.

by attestation). Certificate of ownership. Build brief. Admeasurement brief. Burgher brief (certificate that the master is a Danish subject). Charter party (if vessel is chartered). Muster roll. *Finland.*—Materbref (certificate of measurement). Belbref (certificate of build). Journalen (ship's log-book). Charter party (if vessel is chartered). Folkpass (crew list). *France.*—L'acte de francisation (*i.e.* certificate of nationality). Le congé (sailing license). Le journal timbré (stamped log-book signed by consul on clearance of vessel). Le journal du bord (ship's log-book). National flag. Charter party (if vessel is chartered). Le rôle d'équipage (list of crew). Bill of health. *Germany.*—Messbrief (certificate of measurement). Beilbrief (builder's certificate). Seepass (sailing license). Journal (ship's log-book). Charter party (if vessel is chartered). Musterrolle (muster roll). *Great Britain.*—Certificate of registry.[1] Official log-book. Ship's log-book. National flag and code of signals. Code of signals and numeral flags. Charter party (if vessel is chartered). Shipping articles. Muster roll. Bill of health. *Holland.*—Meetbrief (certificate of tonnage). Bijlbrief (certificate of ownership). Zeebrief (sailing license). Journal (ship's log-book). National flag. Charter party (if vessel is chartered). Monster-rol (muster roll). Bill of health. *Italy.*—Scontrino ministeriale (certificate of registry). Patente sovrana (royal license). Giornale di navigazione (official log-book). Scartafaccio, giornale di navigazione cotidiano (ship's log-book). Charter party (if vessel is chartered). Ruolo dell' equipaggio (list of crew). Bill of health. *Norway.*—Bülbrev (certificate of build). Maalebrev (certificate of measurement). Nationalitetsbrevüs (certificate of nationality). Journale (ship's log-book). Charter party (if the vessel is chartered). Muster roll or mandskabsliste, or volkelist (list of crew). Vessels pur-

[1] Where a vessel, not on the register, becomes at a foreign port the property of persons qualified to be owners of a British vessel, the British consular officer there may grant a provisional certificate, to be in force for six months or until she arrives at some port where there is a British registrar; and this certificate is to contain the name of the vessel, the time and place of her purchase, and the names of her purchasers, the name of her master, and the best particulars as to her tonnage, build, and description that he is able to obtain. (17 and 18 Vict., c. 104, sec. 54.)

A pass with the force of a certificate within the time and limits mentioned therein, may be granted in the case of a British vessel before registry to proceed from any one port or place to any other, both being in her Majesty's dominions. (*Ibid.* sec. 98.)

chased by Norwegian subjects in foreign ports are permitted for two years to sail without a bülbrev or maalebrev. *Russia.*—L'acte de construction ou d'acquisition du navire (builder's certificate). La patente portant autorisation d'arborer le pavillon marchand russe (certificate of nationality). Journal du capitaine (ship's log-book). Charter party (if vessel is chartered). Le rôle d'équipage (crew list). *Spain.*—La patente real (royal license). El diario de navegacion (ship's log-book). National flag. Charter party (if vessel is chartered). El rol (list of crew). Bill of health. *Sweden.*—A passport from the chief magistrate or commissioner of customs. Bilbref (builder's certificate). Mätebref (certificate of measurement). Fribref (certificate of registry). Journalen (ship's log-book). Charter party (if vessel is chartered). Folkpass or sjemansrubla (muster roll). Vessels purchased by Swedish subjects in foreign ports are permitted, on application to the Board of Commerce, to sail for one year without a fribref. *United States.*—Certificate of registry. Sea letter, or certificate of ownership. Ship's log-book. National flag. Charter party (if the vessel is chartered). Shipping articles. Muster roll. Bill of health.

Laws of different States

§ 20. There seems to be some difference in the laws of different States, as well as in the decisions of their courts and in the opinions of their text-writers, with respect to the character of the documents requisite to prove the neutrality of a vessel, and with respect to the effect of those documents even when their genuineness is unimpeached. Bello is of opinion that the passport, or sea-letter, is absolutely indispensable for the security of the vessel. Art. 2 of the French Ordonnance of July 26, 1778, required neutral vessels to prove their neutral character by '*passeports, connaissements, factures et autres pièces d'abord, l'une desquelles au moins constatera la propriété neutre.*' Art. 6 of the Ordonnance of 1861, says: '*Seront encore de bonne prise les vaisseaux, avec leur chargement, dans lesquels il ne sera trouvé chartes-parties, connaissements, ni factures.*' Abreu was of opinion that these words were to be taken collectively and not distributively. But this is evidently erroneous, for another provision of the Ordonnance is (Art. 13) that no friendly or neutral vessel is to be made prize, if the captain produces the 'charte-partie *ou* police de chargement,' which latter word signifies the same as *connaissement.* Massé

seems to think that the absence of a passport is a necessary cause of confiscation, and that it cannot be replaced by any other document. But Hautefeuille, Pistoye and Duverdy, and others, do not consider it as indispensable, and such has been the decision of the French courts. According to English and American decisions, the neutral character of a vessel may be sustained without her having on board either register or passport; although, in the absence of both, the presumption would be against her. *Si aliquid ex solemnibus deficiat, cum aequitas poscit, subveniendum est.* As already stated, the presence of all the usual documents would not be conclusive in her favour.[1]

Decisions of French prize courts

§ 21. As the French decisions on this subject have differed, in some respects, from our own, we will give a synopsis of a few of the most important. In the case of 'Le Nisus' *c.* 'Le Mansouré et Le Rouge,' it was held that a merchant coasting vessel, without documents aboard, was not a good prize, where not required by the laws and usages of its own government; but in the 'Mistick Grec' *c.* 'La Junon,' where such vessel was armed, it was condemned as good prize. In the case of 'La Notre-Dame du Pilier,' it was held that the evidence of the crew, as to the hostile character of the vessel, must prevail over the neutral character of the papers found aboard. The same decision was confirmed in 'Le Munster' *c.* 'Le Brave,' and 'La Nancy' *c.* 'L'Enjôleur.' In 'Le Saint-Antoine' *et al. c.* 'L'Audacieux,' where the vessels were furnished with double documents, French and belligerent, further evidence was resorted to, which evidence established their hostile character, and they were condemned. In 'La Molly' *c.* 'L'Ecole,' notwithstanding the neutral and regular character of the documents found aboard, the vessel was condemned as hostile on other evidence. In the case of 'Le Winyan' *c.* 'L'Ariège,' regular neutral papers were shown, but others showing the hostile character of the vessel were also found aboard, and she was condemned. In the case of 'Le Reysiger' *c.* 'Le Courageux,' two neutral passports were found aboard, one for coasting and the other for a certain destination; it being shown that the second was to be used only on the expiration of the first, the

[1] Massé, *Droit Commercial*, liv. ii. tit. i. § 342; Hautefeuille, *Des Nations Neutres*, tit. xii.; Merlin, *Répertoire*, verb. 'Prises Maritimes,' § 3; Abreu, *Traité des Prises*, pt. i. ch. ii. § 17.

vessel was restored. In the case of 'La Fredricka' it was held, that the effect of documents was not to be determined by their title, but by their contents, and that, where the *instruction du propriétaire*[1] to the captain contained everything that the charter party, invoice, bill of lading, and manifest usually contain, it would serve as a substitute for them all. The character of the vessel, as friendly or neutral, must, as a general rule, be determined by the documents found aboard and the testimony of the captors, but in case of French vessels having simulated enemy papers aboard for the purpose of deceiving the enemy, papers not on board have been admitted as evidence to exempt such vessels from confiscation, as was decided in the cases of 'Le Censor' *c.* 'L'Entreprise' and 'Les Deux Charlottes' *c.* 'Le Flibustier.' In the case of 'Le Jonge Cornelis' *c.* 'L'Actif' *et al.* the vessel of an ally was allowed to prove her nationality by documents not on board at the time of capture. In the case of the Swedish vessel 'L'Eleonora' it was held that *lettres de franchise* were a good substitute for the passport; and in the case of 'La Carolina Wilhelmina' *c.* 'Le Dragon' it was held that, in the Baltic, a certificate of ownership would serve the same purpose. In 'Le Christiern-Swerin' and 'La Paix' *c.* 'Le Général Moreau' it was held that a neutral passport, to be available, must be renewed as often as the vessel returns to ports of her own country; but (in 'Le Quintus' *c.* 'L'Epervier' and 'La Bagatelle' *c.* 'Le Basque') this rule does not apply to coasting vessels or Levant traders. In the case of 'La Constance' *c.* 'Les Deux Amis,' where the passport was found to be null and void, the neutrality of the vessel was determined by other documents found aboard. Passports to vessels absent from the country at the time of their issue are not in general available; vide 'Le Haabet' *c.* 'L'Heureux,' 'Le Munster Doris' *c.* 'Le Brave,' 'La Constance' *c.* 'Les Deux Amis,' 'La Famille,' 'Le Zénodore' *c.* 'La Charitas.' But vessels purchased by one neutral, in the ports of another neutral power, are exceptions to this rule; vide 'L'Engel-Elisabeth' *c.* 'Le Bon Ordre' *et al.*, and 'L'Atten-

[1] It is a master's duty to produce all his papers, and least of all to withhold his instructions, which are very important papers. (The 'Concordia,' 1 *Rob.*, 120.)

To make a voyage fairly alternative it should appear on the papers to be so; for otherwise it must mislead the cruisers of the belligerent countries. (The 'Juffrau Anna,' 1 *Rob.*, 124.)

tion' *c.* 'Le Deucalion.' Other special exceptions were made in the cases of 'La Notre-Dame de Bon Conseil' *c.* 'Le Coureur,' and 'L'Amitié' c. 'Le Camus.' A passport issued by a public officer of a neutral state, residing in an enemy country, he being part owner, was held, in 'Le Wikilladge' *c.* 'L'Emilie,' to be null, and the vessel a good prize. A passport from America to Africa and back is not available for trading voyages between Africa and Europe, and a passport for a neutral port is not good for an enemy's port; vide 'Le Frédéric' *c.* 'L'Ariège,' and 'L'Ami de Boston' *c.* 'La Bellone.' A neutral vessel with a neutral passport, but commanded by a captain born in the enemy's country, is a good prize, although he has been naturalised a neutral after the declaration of war; this is especially so when he has not been domiciled in neutral country, but when he has long resided in neutral country he is regarded as neutral and the ship is safe; vide 'L'Actéon' *c.* 'Le Friendship,' 'L'Arms' *c.* 'La Mascarade,' and 'Le Ruby' *c.* 'Le Bougainville.' Bills of lading signed by the shippers, but not by the captain, are available to prove the neutral character of goods, if the captain has signed the duplicate, delivered to the shippers; vide 'La Constance' *c.* 'Les Deux Amis,' 'La Louise-Auguste' *c.* 'Le Bonaparte,' and 'L'Anna.' It was, also, held, in the same cases, that the want of the captain's signature to the duplicates in his own hands was no cause of capture, as he could have signed them at any time. Where the charter party does not contain a manifest of the cargo, the bills of lading are necessary to prove its neutral character; vide 'L'Anna.' Where there is no particular bill of lading for a part of the cargo, but the manifest has all the formalities required for bills of lading, it is to be regarded as a general bill of lading, and is sufficient to cover the whole cargo; vide 'Le Wilhelm' *c.* 'Le Juste.'[1]

Vessels of discovery

§ 22. Vessels of *discovery*, or of expeditions of exploration and survey, sent for the examination of the Arctic regions, unknown seas, islands, and coasts, are, by general consent, exempt from the contingencies of war, and therefore not liable to capture. Like the sacred vessel which the Athenians sent with their annual offerings to the temple of Delos, they are

[1] Pistoye et Duverdy, *Des Prises*, tit. vi. ch. ii. § 4; Dalloz, *Répertoire*, verb. 'Prises Maritimes,' § 3; Pouget, *Droit Maritime*, tome i. pp. 423 et seq.

respected by all nations, because their labours are intended for the benefit of all mankind.[1] Thus, when Captain Cook sailed from Plymouth, in 1776, in the ship 'Resolution,' accompanied by the 'Discovery,' M. de Sartine, the French Minister of Marine, despatched a letter to the Admiralties and Chambers of Commerce throughout the kingdom, to be communicated to the owners and captains of vessels cruising as privateers or otherwise, directing them, in case they met at sea, to treat him and his vessels as neutrals and friends, provided that he, on his side, abstained from all hostility. This praiseworthy example has since been followed by all civilised powers towards vessels similarly employed. It is, however, usual and proper for the Government sending out such expeditions, to give formal notice to other powers, describing the character and object of the expedition, the number of vessels employed, the nature of their armament, &c., in order that they may issue the proper instructions to their own vessels on the high seas. Such expeditions must confine themselves most strictly to the object in view; if they commit any act of hostility they forfeit their exemption from capture.[2]

Fishing boats

§ 23. Fishing boats have also, as a general rule, been exempt from the effects of hostilities. Henry VI. issued orders on the subject of fishing vessels in 1403 and 1406. In 1521, while war was raging between Charles V.

[1] On the same principle the Vice-Admiralty Court of Halifax restored to the Academy of Arts in Philadelphia a case of Italian paintings and prints, captured on their passage to the United States by a British ship of war in 1812, 'in conformity to the law of nations, as practised by all civilised countries, and because the arts and sciences are admitted to form an exception to the severe rights of warfare' (the 'Marquis de Somerueles,' *Stewart, Vice-Ad. R. of Nova Scotia*, 482). A case of books taken on board a prize vessel was restored by the United States to a literary institution of the hostile State, on the ground that it was not the subject of a commercial adventure (the 'Amelia,' 4 *Phil.*, 412). Lord Howe considered that the custom of nations at war with each other did not justify an officer in wantonly throwing a casket of public money into the sea (Lord Howe's *Life*, p. 479).

[2] In 1793 vessels carrying mails for the English or French Post Office authorities were permitted to convey the mails between the ports of Great Britain and France, notwithstanding the war between those countries. By the Postal Convention of 1843, between France and England, in case of war, the mail packets between Dover and Calais (now extended to all mail packets of either Government by Convention of September 24, 1856) shall continue their navigation until notification be made by either Government, in which case they shall be permitted to return freely to their respective ports.

and Francis, ambassadors from these two sovereigns met at Calais, then English, and agreed that, whereas the herring fishery was about to commence, the subjects of both belligerents engaged in this pursuit should be safe and unmolested by the other party, and should have leave to fish as in time of peace. In the war of 1800, the British and French Governments issued formal instructions exempting the fishing boats of each other's subjects from seizure. This order was subsequently rescinded by the British Government, on the ground that some French fishing boats were equipped as gun-boats (it being intended by the French to form a flotilla of some 500 or 600 of them to employ against England), and that some French fishermen, who had been prisoners in England, had violated their parole, and had gone to join the French fleet at Brest. The British restriction was afterwards withdrawn, and the freedom of fishing was again allowed on both sides. Emerigon refers to ordinances of France and Holland, in favour of the protection of fishermen during war.[1] Fishermen were included in the treaty between the United States and Prussia in 1785, as a class of non-combatants not to be molested by either side. French writers consider this exemption as an established principle of the modern law of war; it has been so recognised in the French courts, which have restored such vessels when captured by French cruisers,[2] and the French Government, for the last forty years, has absolutely prohibited their capture. The United States made a like prohibition during the Mexican war. The doctrine, however, of the English Courts is that such exceptions form a rule of comity only; for fishing vessels fall under the description of ships employed in the enemy's trade, and as such may be condemned as prize.[3]

Cases of shipwreck

§ 24. Some have contended that the rule of exemption ought to extend to cases of shipwreck on a belligerent coast, to cases of forced refuge in a belligerent harbour by stress of weather, or want of provisions, and even to cases of entering such ports from ignorance of the war. There are exceptional cases where such exemption has been granted. Thus, when

[1] Emerigon, *Traité des Assurances*, ch. iv. § 9, and ch. xii. § 19.

[2] Wildman, *Law of Nations*, p. 152; Martens, *Recueil*, &c., tome vi. pp. 503, 515; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 36; liv. ii. ch. xx.; Massé, *Droit Commercial*, liv. ii. tit. i. § 333.

[3] The 'Young Jacob,' 1 *Rob.*, 20.

the English man-of-war, the 'Elizabeth,' had been forced by stress of weather, in 1746, to take refuge in the belligerent port of Havana, the captain offered to surrender himself to the Spanish governor as prisoner, and his vessel as a prize, but the latter refused to take advantage of his distress; on the contrary, he offered him every facility for repairing his vessel, and, on leaving, gave him a safe-conduct as far as the Bermudas. Again, in 1780, an English captain entered the Spanish port of San Fernando de Omoa, in Honduras, without knowing that it was belligerent. The Spanish commandant refused to take advantage of his ignorance, but permitted him to provision his ship and to sail unmolested to Jamaica. On the other hand, the French squadron which entered Louisburg, in the Island of Cape Breton, in 1745, ignorant of its hostile character, was captured as prize, and its officers and crews retained as prisoners of war. The French captain Nalin entered the port of Granada, in the Antilles, in the war of 1780, ignorant of its hostile character. He was immediately seized as a prisoner of war, and his vessel as a good prize. In 1799 a Prussian vessel, 'La Diana,' forced to take refuge in the port of Dunkirk, was restored by the French Tribunal on the principle of *res sacra miseria*; but in the analogous case of 'Maria Arendz,' in 1800, the Court condemned, in strict conformity with the French ordonnances. A court may be compelled by a sense of duty to condemn in such cases, but the sovereign power of the State might well exercise its sense of humanity and generosity by restoring even after condemnation. Notwithstanding the plea raised by French writers in such cases that *le malheur opère de plein droit une trève*, the principle is neither admitted by the general law of nations, nor by the maritime ordonnances of France, nor by her practice during the Revolution.[1]

Distinctions between reprisals and privateering

§ 25. *Letters of marque*, or *mart*, are extraordinary commissions granted by the Admiralty to commanders of merchant ships for reprisals, in order to make reparation for those damages they have sustained, or the goods they have been despoiled of, by aliens at sea, or to cruise against and make prize of an enemy's ships either at sea or in his harbours.

[1] Pistoye et Duverdy, *Des Prises*, vol. i. pp. 114, 122; Ordonnance de 1681; Ordonnance de 1696, May 12; Règlement de 1778, July 26, Arts. 14, 15; Arrêté de 1800, March 27, Arts. 19, 20; Déclaration de 1854, March 29.

There are two species of letters of marque—1st, those which are *special*, for the reparation of injuries sustained by individuals at sea, after all attempts to procure legal redress have failed;[1] and 2nd, those which are *general*, they being issued by the government of one State against all the subjects of another upon an open rupture between them. Letters of marque are always joined to *letters of reprisal*, when it is for the reparation of a private injury; but when the hurt of an enemy is solely intended, as it is in time of war, letters of marque are generally granted alone, without letters of reprisal, and these constitute the commission of the privateer.[2]

A subject cannot for his own benefit make a reprisal without a commission; and if he should do so, the ship he might capture would be a *droit of admiralty* and belong to the sovereign or his grantee. Letters of reprisal are *ordinary* and *extraordinary*; the ordinary are either within or without the realm, and are always granted by the law of England to English merchants who have suffered in their persons or effects by aliens abroad, and cannot upon suit, or the sovereign demanding justice from abroad, obtain redress; in such case the injured person proving that he has prosecuted the offenders in legal course, and has had justice delayed or denied him, shall have a writ, out of Chancery, to arrest the merchant

[1] Extract from letters of reprisal:—'Now know ye that for a full restitution to be made to him for his ships, goods, and merchandises of which the said A. B. was so despoiled as aforesaid, with all such costs and charges as he shall be at for the recovery of the same, we, by the advice of our Privy Council, have thought fit and by these presents do grant license and authorise under our great seal of England our said subject, A. B., his executors, administrators, and assigns for and on behalf of himself to equip, victual, furnish, and set to sea from time to time such and so many ships and pinnaces as he shall think fit . . . and with the ships and pinnaces by force of arms to set upon, take, and apprehend any of the ships, goods, moneys, and merchandises of the kingdom of ———, or any of the subjects inhabiting within any of its dominions or territories, wheresoever the same shall be found, and not in any port or harbour in England or Ireland, unless it be the ships and goods of the parties who did the wrong. And the said ships and goods, moneys and merchandises being so taken and brought into some port of our realms and dominions, an inventory thereof shall be taken by authority of our Court of Admiralty . . . and upon proof . . . they shall be judged lawful prize of the said A. B., his executors, administrators, and assigns, to retain and keep in his or their possessions and to make sale and dispose thereof in open market or however else to his and every of their best advantage and benefit in as ample manner as at any time heretofore hath been accustomed by way of reprisal.'

[2] See 10 Hen. VI., c. 3; 14 Hen. VI., c. 7; and 33 Geo. III., c. 66, ss. 14 and 20.

strangers of the offending nation, or their goods, here in England. This writ is granted to the oppressed subject as a matter of right, not of favour, by the Lord Chancellor Ordinary reprisals cannot be revoked.

Extraordinary reprisals are granted by any Secretary of State, but are only during the good pleasure of the sovereign, and are for the purpose of weakening the enemy in time of war. They may be revoked at any time.

It is lawful for every subject to seize upon the goods or ships of the enemy after war has been proclaimed, but such goods or ships are *droits of Admiralty*. All civilised nations, therefore, are accustomed to grant commissions to individuals authorising them in a special manner to attack and despoil the enemy. This is the case with officers in the army or navy, who take pay, and are under orders, and are liable to punishment for disobedience. Others receive no pay, but go to war at their own charges, providing ships and provisions, to attack or despoil the enemy. This is the case with *privateers*, to whom, instead of pay, leave is granted to keep what they may take from the enemy, when the same has been adjudged lawful prize.[1]

Kent, speaking of the hostilities of private subjects on the high seas, says: 'Vessels are now fitted out and equipped by private adventurers, at their own expense, to cruise against the commerce of the enemy. They are duly com-

[1] Extract from letters of marque for a privateer:—'Whereas we have declared war against the kingdom of ———, and whereas our commissioners for executing the office of our High Admiral have thought A. B. fitly qualified, who has equipped, furnished, and victualled a ship called the "Rose," of the burthen of —— tons, whereof he is commander; and whereas the said A. B. has given sufficient bail, with sureties, to us in our said High Court of Admiralty, according to the effect and form set down in our instructions, a copy whereof is given to the said captain: Know ye therefore that we do by these presents grant commission to and do license the said A. B. to set forth in warlike manner the said ship called the "Rose," under his own command, and therewith by force of arms to apprehend, seize, and take the ships, vessels, and goods belonging to the kingdom of ———, or the vessels and subjects of the King of ———, or others inhabiting within his country, territories, and dominions, and to bring the same to such ports as shall be most convenient, in order to have them legally adjudged in our said High Court of Admiralty of England . . . which being condemned it shall and may be lawful for the said A. B. to sell and dispose of such ships, vessels, and goods . . . And we pray and desire all Kings, Princes, Potentates, States, and Republics being our friends and allies, and all others to whom it shall appertain, to give the said A. B. all aid, assistance, and succour in their ports.'

missioned, and it is said not to be lawful to cruise without a regular commission. Sir Matthew Hale held it to be a depredation in a subject to attack the enemy's vessel, except in his own defence, without a commission. The subject has been repeatedly discussed in the Supreme Court of the United States, and the doctrine of the law of nations is considered to be, that private citizens cannot acquire a title to hostile property, unless seized under a commission, but they may still lawfully seize hostile property in their own defence. If they depredate upon the enemy, without a commission, they act upon their peril, and are liable to be punished by their own sovereign; but the enemy is not warranted to consider them as criminals, and as respects the enemy, they violate no rights by capture. Such hostilities, without a commission, are, however, contrary to usage, and exceedingly irregular and dangerous, and they would probably expose the party to the unchecked severity of the enemy; but they are not acts of piracy, unless committed in time of peace.'[1] Vattel, indeed, says, that private ships of war, without a regular commission, are not entitled to be treated like captives made in a formal war. The observation is rather loose, and the weight of authority undoubtedly is, that non-commissioned vessels of a belligerent nation may at all times capture hostile ships, without being deemed, by the law of nations, pirates, although they may be, by the law of a particular State. They are lawful combatants, but they have no interest in the prizes they may take, and the property will remain subject to condemnation in favour of the Government of the captor, as droits of the Admiralty. It is said, however, that in the United States, the property is not strictly and technically condemned upon that principle, but *jure reipublicæ*; and it is the settled law of the United States that all captures by non-commissioned captors are made for the Government. Wheaton, and some other modern writers, express similar views, but we know of no English or American decision which sustains them; the cases to which they refer consider the lawfulness of such captures with respect to the Government of the captors, but not with respect to the right of the opposing belligerent to punish the act as against him.

[1] Kent, *Comm. on Amer. Law*, vol. i. pp. 94-96.

The doctrine is sustained in the dissenting opinion of Mr. Justice Story in the 'Nereide,' but it was neither involved in the case nor decided by the Court. The continental publicists generally do not admit the distinction attempted to be drawn by Kent. Hautefeuille is clearly wrong when he says: 'It is admitted by all nations that, in maritime wars, every individual who commits acts of hostility, without having received a regular commission from his sovereign, however regularly he may make war, is regarded and treated as guilty of piracy.' By the British naval regulations of 1787, 1826, and 1861, if any ship or vessel shall be taken, acting as a ship of war or privateer, without having a commission duly authorising her to do so, her crew shall be considered as pirates, and treated accordingly; but this is municipal, not international, law. A capture made by such vessel from an enemy is regarded as good prize, and condemned as a droit of Admiralty.[1] All agree that *defensive* hostilities on the high seas, as well as on land, without a commission or public authority, are not criminal acts, but acts fully authorised by the laws of war.[2]

Privateers not used in recent wars

§ 26. Since about the beginning of the fifteenth century, a public license or commission has been considered necessary in order to authorise private vessels to cruise against the

[1] The same where vessels, commissioned against one power, seize the property of another with whom war has subsequently broken out; and the same if the capture be made by a tender to a man-of-war, if it be without an authority or a commission, although it be manned by some of the man-of-war's crew (the 'Charlotte,' 5 *Rob. Adm. R.*, 280). But *contrà* as to a ship's boats and authorised tenders (the 'Carl,' 2 *Sp. Adm. R.*, 261). Non-commissioned persons have no right to any part of the capture they may have made, but the English prize courts often award a recompense, even the whole value of the prize, to the captors. Although in the United States there are in strictness no droits of Admiralty, a prize taken under the above circumstances is condemned to the Government, and if the capture has been made in self-defence, the captor on sending the prize into port for adjudication has a claim for salvage. Query whether in England by the *Common Law* the whole seizure should not go to the captors? See Murrough *v.* Comyns, 1 *Wils.*, 213; Horne *v.* Lord Camden, 1 *H. Bl.*, 476, and 2 *ibid.* 533.

[2] Vattel, *Droit des Gens*, liv. iii. ch. xv. § 226; Martens, *Essai sur les Armateurs*, ch. i. §§ 5–7; Heffter, *Droit International*, § 124; Hautefeuille, *Des Nations Neutres*, tit. iii. ch. ii.; Massé, *Droit Commercial*, liv. ii. tit. i. ch. ii.; Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 9; Robinson, *Collectanea*, p. 21; Sparks, *Dip. Correspondence*, vol. i. p. 443; *Journals of Congress*, vol. vii. p. 187; the 'Georgiana,' 1 *Dod. Rep.*, p. 397; the 'Dos Hermanos,' 19 *Wheaton Rep.*, p. 306; the 'Nereide,' 9 *Cranch. Rep.*, p. 449; the 'Amiable Isabella,' 6 *Wheaton Rep.*, p. 1; Brown *v.* the U.S., 8 *Cranch. Rep.*, p. 132.

enemy.[1] These commissions are otherwise known as *pignoratio*, *clarigatio*, and *androlepsia*. A privateer is sometimes called a *caper*, the only difference being that the latter is a smaller vessel. Its name is probably derived from its practice of hovering about capes. A privateer is generally deemed to be a private ship of war, but only of a temporary character; many, indeed, esteem it but one remove from a pirate. A privateer is less honourable than a merchant ship with letters of reprisal. In order to encourage *privateering*, it is usual to allow the owners of such vessels to appropriate to themselves a portion, at least, of the property they may capture; and, as a necessary precaution against abuse, such owners are required to give adequate security that they will conduct the cruise according to the laws and usages of war, and bring their prizes in for adjudication. But this depends upon the municipal regulations of each particular State, and the instructions of the particular Government which issues the commission or license.[2] All commercial States have deemed checks of this

[1] In the Act passed by the British Parliament during the American revolution, to authorise privateers against the *Colonists*, the words *letters of permission* were employed, not *letters of marque*, as the latter term applies to a foreign enemy only (*Annual Regis.*, 1777, p. 53). With reference to the origin of letters of reprisal, it appears that if a foreign prince or State seized or spoiled the goods of subjects in England, the king made reprisals upon the goods of the other's subjects within the realm, or enabled the party to whom the wrong was done, by letters of marque and reprisal, the goods of other subjects of the same State *mercare retinere et appropriare quousque restitutio facta sit.* (See 2 *Rol.*, 114, 175, l. 20, per Coke, 1 *Rol.*, 175; 4 *Com. Dig.*, 428.) But a subject of the king cannot take the goods of the subjects of a prince in amity with the king by force of letters of another sovereign or State (2 *Ver.*, 592; 4 *Com. Dig.*, 428). As to the grant of letters of marque, see introduction to Godolphin's *Adm. Jur.*

[2] 55 Geo. III., c. 160, which was enacted to expire with the last French war, contained provisions with reference to letters of marque. Security was always taken on the grant of letters of marque for the due observance of the conditions thereof, and this security became forfeited on their transgression (R. *v.* Ferguson, *Edw.*, 84). Letters of marque may be vacated by the Court of Chancery (R. *v.* Carew, 3 *Swan.*, 669; 1 *Vern.*, 54). Cruelty, such as firing into a prize and killing a man after she has struck, has been held to forfeit letters of marque under the provisions of the above statute (the 'Marianne,' 5 *Rob. Adm. R.*, 9), but this seems no more than a formal declaration of the ancient law of the Admiralty. Instructions for the commanders of vessels, having letters of marque and reprisal against the Ligurian and Roman Republics, were issued by the British Government, September 29, 1798, and enacted (*inter alia*) that these privateers should succour any British ship in distress, set on or taken by the enemy; should keep up a correspondence with the Admiralty; should not wear any jack, pennant, or other ensign usually borne by ships of war, but that they should, besides the colours usually borne by

kind essential to their own character and safety, as well as for the protection of the rights of neutrals. But even with these

merchant ships, wear a red jack with the union jack described in the canton at the upper corner thereof; should not ransom or set at liberty any captured ship, or cargo, or any prisoners; and should find bail for good behaviour in the sum of 3,000*l.*, or, if the vessel carried less than 150 men, 1,500*l.* A proclamation, given at St. James's, January 1, 1801, after ordering that no ships or vessels should wear any flags, jacks, pendants, or colours in imitation of those of the Government, and that those ships having letters of marque and reprisal should wear the merchant colours, with the red jack as above mentioned, but that no one else should presume to wear those distinctions, enjoins the Admiralty to punish all offenders against this proclamation. In pursuance of the 1st Article of Union between England and Scotland there was a similar proclamation. The United States Government, in 1812, issued the following instructions to commanders of American privateers:—'The high seas referred to in your commission you will understand generally to refer to low-water mark; but with the exception of the space within one league, or three miles, from the shore of countries at peace both with Great Britain and the United States. You may nevertheless execute your commission within that distance of the shore of a nation at war with Great Britain, and even on the waters within the jurisdiction of such nation, if permitted so to do. You are to pay the strictest regard to the rights of neutral Powers and the usages of civilised nations; and in all your proceedings towards neutral vessels you are to give them as little molestation or interruption as will consist with the right of ascertaining their neutral character, and of detaining and bringing them in for regular adjudication in the proper cases. You are particularly to avoid even the appearance of using force or seduction, with a view to deprive such vessels of their crew or of their passengers, other than persons in the military service of the enemy. Towards enemy's vessels and their crews you are to proceed, in exercising the rights of war, with all the justice and humanity which characterise the nation of which you are members. The master and one or more of the principal persons belonging to the captured vessels are to be sent, as soon after the capture as may be, to the judge, or judges, of the proper court in the United States, to be examined upon oath touching the interest or property of the captured vessel and her lading; and at the same time are to be delivered to the judge, or judges, all passes, charter parties, bills of lading, invoices, letters, and other documents and writings found on board; the said papers to be proved by affidavit of the commander of the capturing vessel, or some other person present at the capture, to be produced as they were received, without fraud, addition, subduction or embezzlement.'

See, on instructions to privateers of the United States, the 'Mary and Susan,' 1 *Wheat.*, 46.

In 1814, during the war between the United States and Great Britain, the Legislature of New York passed an Act, to constitute every association of five or more persons embarking in the trade of privateering a body politic and corporate, with corporate powers, on their complying with certain formalities.

Return of letters of marque and reprisal issued by the Admiralty of Great Britain in the following years:—Against the French Republic, from May 1803 to May 1804, 680 vessels, 27,960 men; ditto, Batavian Republic, from June 1803 to June 1804, 670 vessels, 28,758 men; ditto, Spain, from January 1805 to January 1806, 540 vessels, 25,718 men. Those taken out against France and Batavia were nearly for the same

precautions, privateering is usually accompanied by abuses and enormous excesses. The general opinion of text-writers is, that privateering, though contrary to national policy and the more enlightened spirit of the present age, is, nevertheless, allowable under the general rules of international law. It leads to the worst excesses and crimes, and has a most corrupting influence upon all who engage in it, but cannot be punished as a breach of the law of nations. The enlightened opinion of the world is most decidedly in favour of abolishing it, and recent events lead to the hope that all the commercial nations of both hemispheres will unite in no longer resorting,

ships; of those against Spain, about a fourth are contained in the other two.

The following proclamations were issued by the British Government, on the seizure of some English vessels and goods by the French, without declaration of war by that nation. Proclamation issued February 4, 1793:—'Whereas his Majesty has received intelligence that some ships belonging to his Majesty's subjects have been and are detained in the French ports it is hereby ordered that no ships or vessels belonging to any of his Majesty's subjects be permitted to enter and clear out for any of the ports of France and that a general embargo or stop be made of all French ships or vessels whatsoever now within or which hereafter shall come into any of the ports, harbours, or roads within the kingdom of Great Britain, together with all persons and effects on board the said ships and vessels, but that the utmost care be taken for the preservation of all and every part of the cargoes on board any of the said ships, so that no damage or embezzlement whatever be sustained. And the Right Honourable the Commissioners of his Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports are to give the necessary directions herein as to them may respectively appertain.'

Proclamation issued February 11, 1793:—'Whereas divers injurious proceedings and several unjust seizures have been there made of the ships and goods of his Majesty's subjects, contrary to the law of nations and to the faith of treaties, and whereas the said acts of unprovoked hostility have been followed by an open declaration of war against his Majesty and his ally the Republick of the United Provinces his Majesty is pleased to order that general reprisals be granted against the ships, goods, and subjects of France, so that as well his Majesty's fleet and ships, as also all other ships and vessels that shall be commissioned by letters of marque or general reprisals or otherwise by his Majesty's Commissioners for executing the office of Lord High Admiral of Great Britain shall and may lawfully seize all ships, vessels, and goods belonging to France, or to any persons being subjects of France or inhabiting within any of the territories of France, and bring the same to judgment in any of the Courts of Admiralty within his Majesty's dominions; and to that end his Majesty's Advocate-General, with the Advocate of the Admiralty, are forthwith to prepare the draught of a commission to issue forth and grant letters of marque and reprisal to any of his Majesty's subjects or others, whom the said Commissioners shall deem fitly qualified in that behalf, and also another draught of instructions for such ships as shall be commissionated for the purposes aforementioned.'

in time of war, to so barbarous a practice. Nevertheless, it being generally supposed that privateers furnish to the smaller maritime powers a powerful instrument of war against the military marine of an enemy, it is not easy to obtain their consent to its entire abolition.[1] The efforts, however, which Wheaton says 'have been made by humane and enlightened individuals to suppress privateering, as inconsistent with the liberal spirit of the age,' have already produced their effects upon the conduct of belligerent nations, although they have not yet been able to change the law which tolerates it. During the war between the United States and Mexico, no letters of marque, it is believed, were issued by either party; Mexico offered commissions for privateers, but neutral States forbade their subjects to accept them. In the war of 1854 between Russia and Turkey,

[1] Emerigon, *Traité des Assur.*, ch. xii. sec. 35; *Edinburgh Review*, vol. viii. pp. 13-15; *N. American Review*, N.S., vol. ii. p. 166; Ortolan, *Diplom. de la Mer*, tome ii. lib. iii. ch. i.; Pistoye et Duverdy, *Traité des Prises*, tit. iv. ch. ii. sec. 1; Franklin's *Works*, vol. ii. pp. 13, 15, 447 et seq.; Hautefeuille, *Droit Maritime*, liv. i. tit. ii. § 29; Valin, *Com. sur l'Ord.*, liv. iii. tit. ix.; *Encyc. Americana*, verb. 'Privateering.'

Lord Nelson, writing to the Minister Plenipotentiary at the Court of Sardinia in 1804, says: 'With respect to the history about the French privateers from Ancona, and the conduct of the English privateers at Fiumesino, I believe you are correct, but our enemies never adhere to it. They go in and out of the Spanish and Sicilian ports at all times night and day—in short, to examine all vessels passing. But all privateers are very incorrect, and I sincerely wish there were no such vessels allowed. They are only one degree removed from pirates; but I believe an English armed vessel never yet trusted its cause to any court but an English court of Admiralty. However, I have no power over them. But certainly if the custom of the government of Fiumesino has invariably been not to allow any corsair to sail out of the port until the 24 hours after the sailing of a neutral, then our privateer ought to have been forced to conform. But I dare say the French go in and out of Ancona as they please, and if so, the Court of Rome has no great cause of complaint. I can only again repeat that over privateers I have no control.'

Sir John Barrow, writing in 1838, says: 'There is, however, another and more serious drain of seamen, in time of war, by which they are protected from the impress, and abstracted from the naval service; this is the privateer system, which is carried on to an enormous extent. The great number of letters of marque and reprisal, granted to ships armed and manned, more for the sake of getting to an early market and avoiding convoy than fighting the enemy, occasion a heavy drawback from the entry of men in ships of war.' (Barrow, *Life of Lord Anson*, p. 466.)

In the case of the 'Jonge Vrow Wilhelmina' (not reported) Sir W. Scott, on March 7, 1801, finding that an English privateer had entrapped an innocent neutral master of a vessel, into confessing that he was engaged in a contraband trade, said he feared such practices were too prevalent, and that it was a species of conduct disgraceful to the British flag.

France, England, and Sardinia, the allied powers resolved to issue no letters of marque, and the other States of Europe strictly prohibited their subjects from any participation, by accepting letters of marque, or otherwise, in aiding the belligerents. An Austrian decree of May 25, 1854, prohibits the subjects of his Imperial Majesty from using letters of marque, or any participation in the armament of a vessel, no matter under what flag, and if they infringe that order they will not only be deprived of the protection of the Austrian Government, and liable to be punished by another State, but will also be proceeded against in the criminal courts of Austria. The entry of foreign privateers into Austrian ports is forbidden. An almost simultaneous order, issued by the Queen of Spain, prohibited proprietors, masters, or captains of Spanish vessels from taking letters of marque from any foreign power, or giving them aid, unless in the cause of humanity, in the case of fire or shipwreck. Denmark and Sweden and Norway gave notice to all friendly powers that, during the existing contest, privateers would not be admitted into their ports, nor tolerated in the anchorage of their respective States. Other Governments issued similar orders with respect to their own subjects engaging (either directly or indirectly) in privateering against the shipping or commerce of any of the belligerents, and the Secretary of State of the United States, in reply to the notes of the English and French ministers, communicating the resolutions of the two allied powers not to authorise privateering, said: 'The laws of this country impose severe restrictions, not only upon its own citizens, but upon all persons who may be residents within any of the territories of the United States, against equipping privateers, receiving commissions, or enlisting men therein, for the purpose of taking part in any foreign war.' [1]

Declaration of the Conference of Paris, 1856

§ 27. On April 16, 1856, at the Conference of Paris, the plenipotentiaries of Great Britain, France, Austria, Russia, Prussia, Sardinia, and Turkey adopted a 'declaration concerning maritime law,' containing the following principles, which were made indivisible: '1. Privateering is and remains abolished. 2. The neutral flag covers enemy's goods, with

[1] Wheaton, *Elem. Int. Law*, pt. ii. ch. ii. § 10, note; *Cong. Doc.*, 33 *Cong.*, 1 *Sess.*, *H. Rep.*, *Ex. Doc.*, No. 103; Martens, *Précis du Droit des Gens*, § 289.

the exception of contraband of war. 3. Neutral goods, with the exception of contraband of war, are not liable to capture under an enemy's flag. 4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coasts of the enemy.' This Declaration was not to be 'binding, except between those Powers which have acceded to, or shall accede to it;'[1] but it was also agreed, by the plenipotentiaries, that the

[1] Protocols, Nos. 23 and 24, Congress of Paris, 1856; *President's Message*, August 12, 1856; Phillimore, *On Int. Law*, vol. iii. app. p. 850; Ortolan, *Diplomatie de la Mer*, tome ii. app. spécial, pp. 516–518.

The Declaration of Great Britain made at the commencement of the Crimean war (1854) clearly evinces that at that period Great Britain had retained all her belligerent rights on this subject unimpaired. What may be her policy in a future war is a matter of conjecture; but she has no alternative so long as she adheres to the Declaration of Paris.

Professor de Martens, writing to the Russian *Golos*, in November 1876, concerning the suggestion that Russia should issue letters of marque, to enable privateers to act against British commerce in case of war, in defiance of the Declaration of Paris, says, that while rendering justice to the patriotic motives which inspired such counsels, he considers it a duty to point out their danger and injustice. On the other hand, it is argued that the abolition of privateering has guaranteed England against the only danger she had to fear in the event of war—that is, the ruin of her commerce—that it is the only weapon that can be used by a Continental power against England, that it is a terrible one, furnishing, to the antagonist of the United Kingdom, the means of injuring the latter far more than England, with all her maritime supremacy, could do on her side. As to the argument that the abrogation of the article of the Declaration of 1856, abolishing privateering, would involve that of the other articles stipulating that a flag covers merchandise, that an enemy's property cannot be seized in neutral bottoms, and that a blockade must be effectual, and that England could, therefore, revert to her old policy of declaring on paper all her enemies' ports in a state of blockade, and of searching neutral vessels for enemy's goods—the answer is that, under the existing maritime code, England has sufficient vessels at her command to blockade effectively all the ports, and could, therefore, practically ruin the commerce of a country with which she was at war, as was the case with Russia during the Crimean war.

During the Franco-German war, 1870, the Prussian Government ordered the creation of a volunteer navy, the ships and the crews of which were provided by private persons; the officers received temporary commissions, and sailed under the flag of the Royal Navy, although not forming part of it. The French Government considered this volunteer fleet to be an evasion of the Declaration of Paris, 1856, and drew the attention of the British Government to it, whose law officers were of opinion that there was a substantial difference between a volunteer navy and privateers. This opinion, however, is open to much doubt. The Patriotic Society of Russia in 1878 also formed a volunteer fleet for the purpose of avenging 'the diabolical machinations of Lord Beaconsfield.' The avowed object of the Society, in time of peace, was to maintain a nursery of seamen for the Russian fleet; hitherto these cruisers have been manned by the Imperial marine.

Powers which had or should agree to it, 'cannot hereafter enter into any arrangements in regard to the application of the right of neutrals in time of war, which does not, at the same time, rest on the four principles which are the objects of the said Declaration.' This Declaration does not affect the right to issue letters of reprisal.

Opinion of other States

§ 28. This Declaration of the Paris Conference was communicated to other States, and all have now adhered to it, with the exception of Spain, Mexico, Venezuela, and the United States. Spain and Mexico adopted the last three articles, but, on account of the first article, declined acceding to the entire Declaration. The United States adopted the second, third, and fourth propositions, independently of the first, offering, however, to adopt that also, with the following amendment, or additional clause: '*and the private property of the subjects, or citizens of a belligerent on the high seas, shall be exempted from seizure by public armed vessels of the other belligerent, except it be contraband*,' which offer, however, was not accepted. The abstract *right*, under the law of nations, to use privateers, cannot be questioned; and it must also be observed that the advantage to be derived from the use of private armed vessels in case of war would be much greater to the United States than to any European power; moreover, the European States, most active in advocating the abolition of privateering, were its strongest supporters when it was most conducive to their own power. Unfortunately, nations, like individuals, are more influenced by immediate self-interest, than by the progress of civilisation, the ultimate peace of the world, and the happiness of the human race.[1]

Privateers, by whom commissioned

§ 29. It being established that a belligerent has a right to commission and use private armed vessels in carrying on the war, it remains to enquire by whose authority such commissions may be issued, and who may use them. The right to issue letters of marque is inherent in the Government of every independent State, and is a part of its war-making power; but its own constitution, or internal laws, must determine by what particular branch of the Government this right is to be exercised.

In 1861 the revolted Confederate States of America

[1] Marcy, *Letter to Count Sartiges*, July 28, 1856; the Paris *Moniteur*, July 14, 1858; Lawrence, *Visitation and Search*, p. 195.

employed privateers against the Federal States, in consequence of which a Bill was introduced into the Senate, during the Session of 1861–2 (at the suggestion, it was stated, of the Government, but failed to become law), to authorise the President, during the continuance of the insurrection, to grant letters of marque and reprisal, and to revive in relation to all that part of the United States where the inhabitants have been declared in a state of insurrection, and the vessels and property to them belonging, the Acts passed on this subject during the war of 1812. It was opposed, because it was assumed that letters of marque could only be granted against an independent State, and that their issue might be regarded as a recognition of the Confederate States. Privateering, when attempted by the Confederate States, was branded by the President, and the public sentiment, of the North as piracy.[1] By the second section of the Act of August 5, 1861, the President might instruct the commanders of 'armed vessels sailing under the authority of any letters of marque or reprisal granted by the Congress of the United States, or the commanders of any other suitable vessels,' to subdue, &c., vessels intended for piratical aggressions. The Secretary of the Navy, in a note to the Secretary of State, October 1, 1861, says 'under the (above) clause, *letters permissive* under proper restrictions, or guards against abuse, might be granted. This would seem to be lawful, and perhaps not liable to the objection of granting letters of marque against our own citizens, and that, too, without law or authority from the only constitutional power that can give it.' Early in 1863 a Bill was passed by Congress empowering the President, during three years, to issue *letters of marque*, but this power does not seem to have been employed.

When, in 1569, the Prince of Orange issued letters of marque to the gentlemen and others who became so notorious as the *gueux de mer*, many of them were punished as pirates; 'not so much,' says Martens, 'on account of their excesses, as because it was not thought that the Prince of Orange had power to grant such letters of marque.'[2] The authority which

[1] See *Congressional Globe*, 1861–62, p. 3325.

[2] It is an open question whether privateers, commissioned by a deposed sovereign, are pirates or not. For arguments on the subject see *An Essay concerning the Laws of Nations and the Rights of Sovereigns*, by Matthew Tyndal, LL.D., London, 1734. This work is quoted at some

grants the commission determines what limits shall be imposed upon the exercise by the privateer of belligerent rights; and, if such vessel exceed the limits of its commission, and commit acts of hostility not warranted by the letter which it carries, if such acts be not in violation of the laws of war, it is responsible to and punishable by the State alone from which the commission was issued. A vessel which takes a commission from both belligerents is guilty of piracy, for one authority conflicts with the other. But a nicer question has arisen with respect to a vessel which sails under two or more commissions granted by *allied powers* against a *common enemy*. The better opinion seems to be, that such practice is irregular and inexpedient, but does not carry with it the substance or name of piracy. Kent does not make this distinction, but states the proposition in general terms, 'that a cruiser, furnished with commissions from two different powers, is liable to be treated as a pirate.' Hautefeuille says, that if a privateer receives commissions from two sovereigns, she is to be treated as a pirate, 'even where the letters of marque *emanate from two powers allied for a common war*.' Another question to be noticed is, what is the character of a vessel of a *neutral* State, armed as a privateer, with a commission from one of the belligerents? Phillimore says, 'that such a vessel is guilty of a gross infraction of international law; that she is not entitled to the liberal treatment of a vanquished enemy, is wholly unquestionable; but it would be difficult to maintain that the character of piracy has been stamped upon such a vessel by the decision of international law.' Kent is of opinion that the law of the United States, which declares

length by Sir R. Phillimore (*Int. Law*, i. 362), who inclines to the opinion that such ships are pirates.

Lord John Russell, writing to Lord Lyons, January 24, 1862, says, respecting the letter of Judge Daly on the question whether Southern privateers' men can be regarded as pirates: 'Her Majesty's Government are glad to find that the pretension has been so successfully combated. There can be no doubt, that men embarked on board a man-of-war or privateer, having a commission, or of which the commander has a commission, from the so-called President Davis, should be treated in the same way as officers and soldiers, similarly commissioned for operations on land. An insurrection extending over nine States in space, and ten months in duration, can only be considered as a civil war; and persons taken prisoners on either side, should be regarded as prisoners of war. Reason, humanity, and the practice of nations require that this should be the case.' (See opinion of Judge Daly, *ante*, ch. iii. § 21, note.)

As to illegal capture by privateers, see ch. xxxi. § 31.

such an act a high misdemeanour, punishable by fine and imprisonment, is 'in affirmance of the law of nations.' Ortolan thinks that such an act is not piracy in international law, but that it ought to be made so. Hautefeuille is of opinion that they are not to be treated as pirates, unless made so by interior laws of treaty stipulations of the neutral State. We have already alluded to the instructions of European States on this question, and will only add here, that by the law of Plymouth Colony, in 1682, it was declared to be felony to commit hostilities on the high seas, under the flag of any foreign power, upon the subjects of another power in amity with England; and the same acts were declared to be felony by the law of the Colony of New York in 1699.[1]

Treaty stipulations

§ 30. Some States have covenanted, in their treaty stipulations, that they will prevent their subjects, under heavy penalties, from accepting commissions or letters of marque from other States. Such was the character of the treaty of September 26, 1786, between France and England. In other treaties it is stipulated that no subject, or citizen of either of the contracting powers, shall accept a commission or letter of marque to assist an enemy in hostilities against the other, under pain of being treated as a pirate. Such is the character of the treaties entered into between the United States and France,[2] Holland, Sweden, Prussia, Great Britain, Spain, Columbia, Chili, &c. Some of these treaties, however, have expired without this provision being renewed in any subsequent treaty. It may be remarked that, whatever be thought of the character, in international war, of a neutral vessel taking a commission from a belligerent, the other belligerent is justified in treating such vessel as a pirate, when it is so stipulated in a treaty

[1] Kent, *Com. on Am. Law*, vol. i. p. 100; Phillimore, *On Int. Law*, vol. i. § 358; Kluber, *Droit des Gens*, § 260; Ortolan, *Dip. de la Mer*, liv. ii. ch. xi.; Hautefeuille, *Des Nations Neutres*, tit. iii. ch. ii.; Abreu, *Tratado de las Presas*, pt. ii. cap. i. §§ 7, 8; Martens, *Essai sur les Armateurs*, ch. ii. § 14; the 'Spitfire,' 2 *Rob.*, 285.

[2] The French Government, when in alliance with the American States, in 1778, observed more than usual respect towards neutral vessels, but in 1796 they changed their views, and seemed to think that privateering could not be too much encouraged, and for some years after privateering absorbed the whole naval energy of the State. This was carried to such an unlimited and licentious degree, that neutral vessels avoided the French coast, which entailed much injury on the commerce of that country. Accordingly we find a decree of Napoleon Buonaparte, annulling the decisions of Merlin and others, and restoring the usages of 1778.

with the neutral State, or when the laws of the neutral State declare such acts to be piracy. This case is readily distinguishable from that in which the slave trade is made piracy by the municipal law of a particular State, for such trade is not considered as prohibited by the law of nations.[1]

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 10, note *a*; *ante*, vol. i. 248.

CHAPTER XXIII

TRADE WITH THE ENEMY

1. Property of subjects and allies engaged in trade with the enemy liable to confiscation—2. Exceptions—3. Rule rigorously enforced—4. Cases of attempt to evade it—5. Withdrawal from enemy's country at beginning of war—6. Distinction between cases of domicile and mere residence—7. Necessity of a license discussed—8. Decisions in the United States—9. Where order of shipment cannot be countermanded—10. Good faith or mistake no defence—11. Trade through a neutral port—12. Vessels liable to capture during continuous voyage—13. When offence is completed—14. Share of partner in neutral house—15. Transfer of ships—16. Regularity of papers not conclusive—17. Trade by resident or domiciled stranger—18. Distinction between native subject and domiciled stranger—19. Effect of acceptance of a license from the enemy—20. Possessions and colonies of the enemy—21. Rule of insurance.

Property of subjects engaged in trade with the enemy liable to confiscation

§ 1. IT may be stated, as a general proposition, that the property of a subject found engaged in trade or intercourse with the ports, territories, or subjects of a public enemy is liable to confiscation. This rule is not founded on any peculiar criminality in the intentions of the party, or on any direct loss or injury resulting to the State, but is the necessary consequence of a state of war, which places the citizens or subjects of the belligerent States in hostility to each other, and prohibits all intercourse between them. The protection of the interests and welfare of the State makes the application of this rule especially necessary to the merchant and trader, who, under the temptations of an unlimited intercourse with the enemy, by artifice or fraud, or from motives of cupidity, might be led to sacrifice those interests. The same rule is applicable to the subjects of an ally. Where two or more States are allied in a war, the relations of the subjects of the ally towards the common enemy are precisely the same as those of the subjects of the principal belligerent. In this respect there is no distinction between the two; and if the courts of their own country do not enforce the rights and duties of war, those of

the principal or co-belligerent may do so, for the tribunals of all have an equal right to enforce the laws of war, and to punish any infractions, whether committed by the subjects of their own government or of that of an ally. As neither of the allies in a common war can relax in favour of its own subjects, without the consent of its co-belligerent, the general rule which prohibits all commercial intercourse with the common enemy, it is held that the subjects of one State cannot plead in the prize courts of its ally the permission of their own sovereign to engage in such prohibited trade, and that such permission will not exempt from condemnation the property so employed. This rule seems to be founded on good and substantial reasons. We quote the remarks of Sir William Scott on this point. 'It is of no importance,' he says, 'to other nations, how much a *single belligerent* chooses to weaken and dilute his own rights. But it is otherwise when *allied nations* are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express contract, that one State shall not do anything to defeat the general object. If one State permits its subjects to carry on an interrupted trade with the enemy, the consequence may be that it will supply that aid and comfort to the enemy, especially if it is an enemy depending very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause, and the interests of its ally.' He therefore concludes, that it is not enough to say that *one* State has given its permission, but that it should also appear that the trade has the allowance of the *confederate State*, or that it can, in no manner, interfere with the common operations.

§ 2. There are but two exceptions to this general rule interdicting trade with the enemy: 1st, the mere exercise of the rights of humanity; 2nd, the trade sanctioned by the license or authority of the government. The first of these exceptions would permit intercourse with the enemy, to such a limited extent, and of so rare an occurrence, as to require no particular discussion; the second results from the fact that on certain occasions it is highly expedient for the State to permit an intercourse with the enemy, by commerce or otherwise; but the State alone, and not individuals, must determine when it shall be permitted, and under what regulations. **Exceptions to rule**

Without such direct permission of the State, no commercial intercourse with the enemy is allowed to subsist.[1]

Rule rigorously enforced

§ 3. The rule which prohibits every form of commercial intercourse or trade with the enemy, whether by the subjects of the belligerent or of his allies, is enforced in courts of prize with a stern and inflexible rigour. 'No motives of compassion or indulgence,' says Mr. Duer, 'prompted by the hardship of the particular case, nor any views of public utility, derived from the innocent or beneficial nature of the particular traffic, are ever allowed to suspend or mitigate its application. Such considerations are not regarded as legal distinctions that can operate to create an exception from the general rule. They may influence properly the discretion of the executive power, but must be rejected by the judicial conscience.' No matter how, or under what circumstances, such trade may be carried on, or attempted (with the single exception already mentioned), the same penalty of confiscation will attach. It, therefore, is not necessary that the ship in which the goods, engaged in such illegal traffic, are transported, should also belong to a subject of the belligerent whose rights are violated. The vessel may be neutral, but the neutrality of the flag, where the traffic is illegal, will afford no more protection to the goods of a subject than to those of an enemy. It is by means of neutral vessels that such illegal traffic is usually carried on, as appears in most cases in which condemnation has been pronounced. Any attempt by a subject to import goods from the enemy's country, without the license of his own government, is a violation of duty on his part, and involves his property so employed in the penalty of confiscation. It is not necessary that these goods should be the fruits of any purchase, barter, contract, or negotiation, in the enemy's country after hostilities had commenced. The sailing of the vessel with the goods on board, after the party had a knowledge of the war, completes the offence, stamps the cargo with an illegal character, and subjects it, during its transportation, to a rightful

[1] Manning, *Law of Nations*, p. 122; Chitty, *Law of Nations*, pp. 276, 277; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. caps. ix. and xv.; Wheaton, *Elem. Int. Law*, pt. 4, ch. i. §§ 13, 14; Phillimore, *On. Int. Law*, vol. iii. §§ 69 et seq.; Heffter, *Droit International*, § 123; Duer, *On Insurance*, vol. i. pp. 555, 579; Wildman, *Int. Law*, vol. ii. p. 245; Jacobsen, *Seerecht*, §§ 719-731; the 'Neptunus,' 6 *Rob.*, 406; the 'Hoop,' *Rob.*, 200; the 'Ceres,' 3 *Rob.*, 79; the 'Nayade,' 4 *Rob.*, 251; as to licenses to trade see ch. xxx., *post*.

seizure. The propriety of strictly adhering to this rule is vindicated by Judge Story, with his usual ability, in the case of the 'Rapid,' where the question is fully discussed.[1]

[1] 1 *Gall. R.*, 295; Duer, *On Insurance*, vol. i. pp. 556–559; the 'St. Philip,' 8 *Term. R.*, 556. As to a ship bound to a foreign port with cargo, entering that port after rumours of war between her country and the country of that port, see the 'Teutonia,' *L. R.*, 4 *P.C.*, 171; and also the 'San Roman,' *L. R.*, 3 *A. and E.*, 583; the 'Express,' *ibid.* 597; the 'Patria,' *ibid.* 436.

Where the claimant left the enemy's port, with the intent to withdraw from the enemy's country with his effects, and had for that purpose converted his property into the vessel and cargo, and intending to give himself up to the blockading squadron, it was held that the vessel and cargo were not liable to capture as enemy's property. (The 'General Pinckney,' *Blatchf. Pr. Cas.*, 668.)

Again, during the civil war, some cotton which had been purchased by a loyal citizen of the United States in Texas, the enemy's country, was captured on a flat boat, in the act of being exported during a blockade. It was condemned by the District Court of New York, but sentence was reversed on appeal to the Circuit Court, on the ground that the claimant had gone to Texas, before the war, to collect debts due to him, and that this cotton was the proceeds; moreover, that he had used all diligence to collect his effects, with a view to leave the hostile country after the breaking out of the war. ('Fifty-two Bales of Cotton,' *Blatchf. Pr. Cas.*, 644.)

A voyage from an enemy to a neutral port, but with directions to put into a British port to obtain a license, the proof of such directions and consequent intention being clear, was held not to be illegal, or a breach of a certain prohibitive Order in Council of January 1807; restitution accordingly, with captors' expenses. (The 'Mercurius,' *Edwards*, 53, and the 'Minna,' therein cited.)

The conveyance of passengers for hire held equivalent to the conveyance of goods for freight, and therefore to be a trading within the prohibitions prescribed by the Orders in Council of April 26, 1809, prohibiting all trade by neutrals with France. (The 'Rose in Bloom,' 1 *Dodson*, 58.)

A resident in England cannot enter into an engagement to raise money by way of loan to assist subjects of a foreign State to prosecute a war against a Government in alliance with England, without the license of the Crown. (Demetrius de Wütz *v.* Hendricks, 9 *Moore C. P. Rep.*, 580.)

By Art. 77 of the French Penal Code, anyone who may engage in schemes or enter into communication to supply the enemy with money is punishable with death. For the opinion of the English Courts see R. *v.* Hensey, 1 *Burr. R.*, 650.

As to the punishment of holding correspondence with the Confederates by subjects of the United States, during the last Civil War, see Act of February 25, 1863, 12 *Stat. at L.*, 696.

A British subject resident in a *neutral* country may engage in trade with the enemy of his own country, but not in articles of a contraband nature, the duties of allegiance travelling with him so as to restrain him to that extent. (The 'Neptunus,' 6 *Rob.*, 409; the 'Ann,' 1 *Dodson*, 223; the 'Emanuel,' 1 *Rob.*, 302.)

A British-born subject domiciled in a *neutral* country is not prevented from trading with a country inimical to his own. (Bell *v.* Reid, and Bell *v.* Buller, 1 *M. and S.*, 726; Marryatt *v.* Wilson, 1 *B. and P.*, 430.)

Commerce by a person resident in an enemy's country, even as representative of the Crown of England, is illegal and the subject of prize,

Cases of attempt to evade it

§ 4. Numerous attempts have been made to evade this rule by allegations of special exceptions. In cases of this kind it has been alleged that the property in the specific goods was acquired before the war, as in the case of the 'Louisa Margaretha;' or that the goods were actually shipped as well as purchased before hostilities commenced, as in the cases of the 'Eenigheid,' the 'Fortuna,' and the 'Mary;' or that the ship on which the goods were found had been forcibly detained, as in the case of the 'Alexander;' or that the goods were the produce of funds in the enemy's country, which the party had no other means of withdrawing, as in the cases of the 'Lady Jane,' the 'William,' and the above-mentioned 'Rapid.' It was decided by the English Court of Common Pleas, in Potts *v.* Bell, that goods might be lawfully exported from an enemy's country, although purchased during the war, where the sole object of the purchase was to enable the parties to remit to their own country their funds and effects, which were in the enemy's country when the war was declared; but this exception was subsequently overruled upon a writ of error brought into the King's Bench.[1]

Withdrawal from enemy's country at beginning of war

§ 5. Vattel and Burlamaqui concur in the doctrine, that both justice and humanity require that persons, who are surprised by a war in an enemy's country, should have a reasonable time to withdraw their persons and effects, and ought not to be treated as enemies, unless their departure should be unreasonably delayed. This view is countenanced by several eminent writers on public law, and the language of

however beneficial to his country, unless authorised by license (*Ex parte* Baglehole, 18 *Ves., jun.*, 528; 1 *Rose*, 271). But a supply of articles for the use of the British fleet was held to be an exception to the rule. (The 'Madonna delle Gracie,' 4 *Rob.*, 195.)

If an English subject employ a neutral to trade for him, in the country of the enemy, the neutral is considered to be a mere agent, and the transaction is illegal. (The 'Samuel,' 4 *Rob.*, 284.)

For cases concerning the unlawfulness of various dealings with residents of the insurgent States, during the American Civil War of 1861–65, see the 'Reform,' 3 *Wall.*, 617; United States *v.* Weed, 5 *ibid.* 62; the 'Gray Jacket,' *ibid.* 342; the 'Hampton,' *ibid.* 372; the 'Sea Lion,' *ibid.* 630; the Cotton Cases, 2 *Ct. of C. C. R.* (*Nott and H.*), 529; S. C., 6 *Int. Rev. Rec.*, 21; Blakeley *v.* United States, 2 *Ct. of C. C. R.* (*Nott and H.*), 323; the 'David E. Wolf,' 1 *Int. Rev. Rec.*, 194.

[1] The 'Louisa Margaretha,' 1 *Rob.*, 203; 9 *Cranch.*, 132; the 'Eenigheid,' 1 *Rob.*, 210; the 'Fortuna,' 1 *Rob.*, 211; the 'Mary,' 1 *Gallis.*, 620; the 'Alexander,' 8 *Cranch.*, 169; the 'Lady Jane,' 1 *Rob.*, 202; the 'William,' 1 *Rob.*, 214; the 'Grey Jacket,' 5 *Wall.*, 342; Potts *v.* Bell, 8 *Term. R.*, 548.

Sir William Scott, on several occasions, seems to justify the conclusion that a distinction in favour of persons thus circumstanced would be admitted in the English Admiralty.[1] 'It seems a necessary deduction,' says Mr. Duer, 'from these views, that, in the judgment of these writers, the property of persons thus withdrawing themselves from the enemy's country would, in the course of transportation, be entitled to the protection of their own government; since, otherwise, the very object of the lenity exercised toward them might be defeated, and that, which was granted a favour, would be converted into a snare. To confiscate the property of subjects, in the act of returning to their allegiance, is the extreme of injustice, as well as of impolicy. It is to punish those whom their country should desire to reward.'[2]

Distinction between cases of domicile and mere residence

§ 6. A distinction must be here noticed between the property of a citizen *resident* in a foreign country, and that of one *domiciled* in the belligerent State. The property of a citizen domiciled in a foreign country, when that country becomes involved in a war with that of his allegiance, is at once liable to be condemned as that of an *enemy*. But that of a citizen simply resident in the belligerent State, if condemned on his attempt to withdraw it from the enemy's country, must be condemned as that of a citizen engaged in *an unlawful trade with the enemy*. The Supreme Court of the United States have decided that the property of American citizens *domiciled* in an enemy's country, although shipped before a knowledge of the war, was, by that event, irredeemably stamped with a hostile character, and the goods were condemned as a lawful prize. But the case of a citizen, merely resident in the enemy's country, presents a very different question.[3]

[1] This seems to have been denied in Potts *v.* Bell, *supra*—overruling Bell *v.* Gilson (1 *Bos. and Pull.*, 345); see, however, the 'Drie Gebroeders,' 4 *Rob.*, 234.

[2] Duer, *On Insurance*, vol. i. pp. 561–563; Vattel, *Droit des Gens*, liv. ii. ch. xviii. § 344; liv. iii. ch. iv. § 63; ch. v. §§ 73, 77; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. 7; Brown *v.* the U. S., 8 *Cranch.*, 125; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. x.; Bello, *Derecho Internacional*, pt. ii. cap. ii. § 2.

[3] Wheaton, *Elem. Int. Law.*, pt. iv. ch. i. § 17; the 'Venus,' 8 *Cranch.*, 253. Property belonging to a merchant residing and trading at an enemy's port is, if captured, liable to condemnation as enemy's property (the 'Delta,' *Blatchf. Pr. Cas.*, 133). But a citizen, temporarily residing in an enemy's country, is, at the breaking out of war, entitled to a reason-

Necessity of a license of withdrawal discussed

§ 7. If it be admitted that it is the duty of a government to facilitate the withdrawal of its own citizens and their property from an enemy's country, the question next to be considered is the propriety of requiring the citizens to procure a license from their own government for the transportation of such property. On this question Mr. Duer remarks: 'It is, doubtless, right and necessary that a merchant, not resident in an enemy's country, who desires, at the commencement of a war, to withdraw his property and effects, should obtain a license from his own government. He is guilty, otherwise, of a voluntary trading. The good faith of a person who has the power to apply for a license, and neglects the duty, is liable to just suspicions; and the express permission of the government is, in such cases, the only adequate security against abuse and fraud. But the propriety of requiring a person, who is seeking to escape from a hostile country, to continue a residence that exposes his person to imprisonment, and his property to seizure, until a license from his own government can be obtained, so far from being evident, can, by no means, be admitted. His ability to return—to save himself and his property—may depend upon measures that, to be effectual, must be immediate; and the necessary delay in procuring a license would operate, in most cases, to defeat the execution of the design.' Mr. Duer, therefore, adopts the conclusion that a license is not in all cases necessary, and 'that the property of subjects withdrawing themselves, in

able time to collect his effects, and to convert them into available and manageable funds, so as to enable him to withdraw them from that country; and in such case his effects will not be treated as enemy's property (the 'John Gilpin,' *Blatchf. Pr. Cas.*, 661). Property captured at sea, and owned by persons resident in an enemy's country, is hostile, and subject to condemnation without any evidence. Notwithstanding the individual opinion or sympathies of the owner, and although he may be the subject of a neutral nation, or of the capturing belligerent, and may have expressed no disloyal sentiments towards his native country, nevertheless his residence in the enemy's country impresses upon his property, engaged in commerce and found on the high seas, a hostile character, and subjects it to penalties as such. Thus, the property belonging to a permanent resident of the Confederate States, and captured on the ocean, was held to be a lawful prize. Condemnation is not the infliction of personal punishment, but the exercise of a belligerent policy for the destruction of the enemy's resources (the 'Amy Warwick,' 2 *Sprague*, 143). A citizen of the United States was held to be disqualified from appearing in a prize court to question the legality of the seizure of his property acquired during war in an enemy's country, by trade with the enemy (the 'Napoleon,' *Blatchf. Pr. Cas.*, 296).

good faith, from a hostile country, within a reasonable time after knowledge of the war, is not stamped with the illegal character of a trading with the enemy; but is to be considered, by a just exception from the general rule, as exempt from confiscation. Such would be the probable decision of the question in the English courts of prize; nor is it by any means certain that an opposite determination would be made in those of the United States. The exact question has not yet been determined by the supreme tribunal; nor is its decision involved as a necessary consequence in the cases that have hitherto occurred.'[1]

Decisions in the United States

§ 8. The language of Mr. Justice Story, in the cases of the 'Rapid' and the 'Mary,' in the Circuit Court, amounts to a clear denial of the existence of the right in question, under any circumstances; although in the case of the 'St. Lawrence,' subsequently decided in the Supreme Court, where the opinion of the court was given by the same distinguished judge, any direct decision of this question was studiously avoided, and that case was decided on the ground that the property had not been withdrawn from the enemy's country *within reasonable time* after the knowledge of the war. This exact question, as already remarked, has never been determined by the Supreme Court of the United States, nor is its decision involved, as a necessary consequence, in the cases which have been adjudicated before that tribunal. In a case decided in the Supreme Court of the State of New York, it was held that a citizen of one belligerent *may* withdraw his property from the country of the other belligerent, provided he does it within a reasonable time after the declaration of the war, and does not himself go to the enemy's country for that purpose. In delivering the opinion of the court in this case (Amory *v.* McGregor), Chief Justice Thompson remarks, that, from the guarded and cautious manner in which the Supreme Court of the United States had reserved itself upon this particular question, there was reason to conclude that when it should be distinctly presented, it would be considered as not coming within the policy of the rule that renders all trading or intercourse with the enemy illegal.[2]

[1] Duer, *On Insurance*, vol. i. pp. 564-566; the 'Madonna delle Gracie,' 4 *Rob.*, 198.

[2] Phillips, *On Insurance*, vol. i. p. 84; the 'Rapid,' 1 *Gallis. R.*, 304;

Where order of shipment cannot be countermanded

§ 9. The only well-established exception to the rule which confiscates all goods imported from the enemy's country, during the war, is where it is shown that the goods were purchased under an order given previous to the commencement of hostilities, and that it was not in the power of the owner, by any diligence, to countermand the order in time to prevent the shipment. It must, however, be clearly shown that all possible diligence was used, after the first notice of hostilities, to countermand the voyage.[1]

Good faith or a mistake no defence

§ 10. The good faith or mistake of the party affords no protection to the ship or goods engaged in illegal trade with an enemy. The entire absence of any intention to violate the law, no matter how perfect the innocence of the intent may have been, nor whether the act resulted from mistake or ignorance, cannot avert the penalty of confiscation. In the celebrated case of the 'Hoop,' decided by Sir William Scott, the goods had been imported from an enemy's country with the express sanction of the commissioners of the customs, under an erroneous interpretation of a special provision of an Act of Parliament; but, while admitting and lamenting the hardship of the case, the judge felt himself compelled to pronounce a condemnation. He referred, in his opinion, to numerous cases where the Lords of appeal had rigorously enforced the rule, notwithstanding the strongest mitigating circumstances.[2]

Trade through a neutral port

§ 11. The ulterior destination of the goods determines the character of the trade, no matter how circuitous the route by which they are to reach that destination.[3] Even where the

the 'Mary,' 1 *Gallis. R.*, 621; the 'St. Lawrence,' 9 *Cranch.*, 124; Amory *v.* McGregor, 15 *Johns. R.*, 24; Rush, *Opinions of U.S. Attys.-Genl.*, vol. i. p. 175.

[1] The 'Juffrow Catharina,' 5 *Rob.*, 141; the 'Fortuna,' 1 *Rob.*, 211; the 'Freeden,' 1 *Rob.*, 212.

[2] The 'Hoop,' 1 *Rob.*, 196; the 'Angélique,' 3 *Rob.*, app. 9; the 'Nelly,' 1 *Rob.*, 219, note; the 'Franklin,' 6 *Rob.*, 127; Griswald *v.* Waddington, 16 *Johns. R.*, 438; Scolefield *v.* Eichelberger, 7 *Peters R.*, 586.

In the case of the 'Hoop,' reference is made to an authority, in Rolle's Abridgment, 173, showing that it was anciently deemed illegal to trade with Scotland, when that country was at war with England. Sir W. Scott observes thereon, that the rule against trade with an enemy is just as weighty on land as on water, but that cases had more frequently happened upon water, in consequence of the insular situation of England.

[3] This doctrine is only settled in the American Courts. The 'Stephen Hart,' 2 *Marit. Cas.*, 73; the 'Commercen,' 1 *Wheat.*, 388; Historicus,

ship in which the goods are embarked is destined to a neutral port, and the goods are there to be unladen, yet, if they are to be transported thence, whatever may be the mode of conveyance, to an enemy's port or territory, they fall within the interdiction and penalty of the law. The converse of this is also undoubtedly true; that is, trade *from* an enemy's country, through a neutral port, is unlawful, and the goods so shipped through a neutral territory, even though they may be unladen and trans-shipped, are liable to condemnation. It is an attempt to carry on trade with the enemy, by the circuitous route of a neutral port, and thus evade the penalty of the law. But the law will not countenance any such attempts to violate its principles by a resort to the shelter of neutral territory; any such voyage is illegal at its inception, and the goods shipped are liable to seizure at the instant it commences. A coasting or colonial trade, limited to the ports of the enemy, so far from meriting any indulgence, is regarded as peculiarly noxious, and the ship and goods so employed, with a knowledge of the war, cannot escape the penalty of condemnation. 'The conduct of the citizen,' says Duer, 'who thus incorporates himself with the commerce and interests of the enemy, admits of no palliation or excuse; it is not simply blameable, but highly criminal.' [1]

Continuous voyages

§ 12. A vessel engaged in unlawful trade with the enemy is liable to capture and condemnation at any time during the voyage in which the offence is committed, but not after the voyage is completed. If, however, the voyage is continuous

Addit. Letters, 43. The English Courts seem rather to have inclined to the doctrine that it is the destination of *the vessel* which determines the character of the trade, and not the destination of the goods. The 'Hendric and Alida,' 1 *Hay and Marr.*, 96; Hobbs *v.* Henning, 5 *New Rep.*, 406; the 'Diana,' *Lords of Appeal*, March 1, 1806. In the case of the 'Exchange' (*Edwards*, 39), a ship having been condemned for a deviation towards an enemy's port, the cargo was held to be involved, by such deviation, in the fate of the ship.

[1] Kent, *Com. on Am. Law*, vol. i. p. 81; Wheaton, *Elem. Int. Law*, pt. iv. ch. i. § 17; Duer, *On Insurance*, vol. i. pp. 569, 570; the 'Diana,' 2 *Gallis. R.*, 98; the 'Wellington,' 2 *Gallis. R.*, 103; the 'Jonge Pieter,' 4 *Rob.*, 79; the 'William,' 5 *Rob.*, 393.

This trade, by a citizen, should not be confused with that carried on by a neutral. Modern jurists consider that it is contrary to free trade that a coasting or colonial trade should be denied the latter. The right of a belligerent to prohibit such trade unquestionably exists, but the present spirit and disposition of the European Powers are such as to render it very doubtful whether, in case of war, this right would be again enforced against neutrals.

and entire, although consisting of separable parts, she is liable to capture while any portion of it remains to be performed, even where the part in which the offence was committed has been completed. This point has been fully discussed and decided in the Supreme Court of the United States.[1]

When offence is completed

§ 13. Actual trading with the enemy is not necessary to subject a ship or goods to confiscation. It is sufficient, as a general rule, that they are engaged in a voyage with that design, in order to complete the offence, and to incur the penalty. So also a ship belonging to a subject, and proceeding to an enemy's port in ballast, with no positive intention of procuring a cargo, or returning therefrom without any cargo, would be liable to capture both on her outward and return voyage. It would be in vain to allege that there was no act or intention of trading. But the mere intention to trade with the enemy is not punishable, if at the time of capture the execution of the intent is no longer practicable. Where, from fortuitous circumstances, whether known or unknown to the parties, the execution of the design can no longer be effected, the intent does not constitute the crime, for no crime could be committed. A criminal intent is never punishable, if, before the design can be executed, its execution becomes *impossible.* Thus, a British ship bound to a West India Island—an enemy's country—but captured after the island had, in fact, surrendered to the British forces, was restored by Sir William Scott.[2] That particular case, however, was distinguished from the general rule as laid down by Duer, which requires the full sanction of judicial decisions.[3]

§ 14. Where the property seized for illegal traffic with the

[1] Wildman, *Int. Law*, vol. ii. pp. 20–23; the 'Joseph,' *Cranch.*, 454, 455; the 'Memphis,' *Blatchf. Pr. Cas.*, 260; and see ch. xxviii. § 22.

[2] Sir W. Scott also restored a Dutch ship from Demerara (a Dutch colony), which had been captured, at sea, several days after that colony had capitulated to the British forces, one of the terms of the capitulation being that the inhabitants were to be permitted to export their own property, and to be treated in all respects like British subjects (the 'Negotie en Zeevaart,' 1 *Rob.*, 3). But on appeal the House of Lords reversed the decision on the ground that property sailing after a declaration of hostilities, and taken on a voyage, cannot be protected by an intermediate capitulation; Lord Camden observing, that 'the ship sailed as a Dutch ship, and could not change her character *in transitu.*'

[3] The 'Abbey,' 5 *Rob.*, 251; Wildman, *Int. Law*, vol. ii. p. 22; the 'Imma,' 3 *Rob.*, 167; the 'Lisette,' 6 *Rob.*, 387; the 'Trende Sostre,' 6 *Rob.*, 390, in notes.

enemy belongs to a house of trade, established in a neutral country, but of which one of the partners is a resident subject of the belligerent country, his share, notwithstanding the neutrality of the house, is condemned. The rule is equally applicable, even where the belligerent party is strictly dormant, and takes no part whatever in the direction and management of the affairs of such trading house. If he is a party interested in the property so contaminated, he must suffer the penalty of the offence. He cannot engage as a partner in a transaction in which he could not lawfully engage, if alone.[1]

Share of partner in neutral house

§ 15. Courts of prize regard with extreme suspicion and jealousy the transfer of ships from subjects to neutrals, during the war. If such a ship is subsequently employed in a trade with the enemy, very slight *indicia* of fraud would cause her condemnation. Thus, an English vessel, asserted to have been sold to a neutral, after hostilities had been commenced between England and Holland, was captured while engaged in trade between Guernsey and Amsterdam, under the command of her former master, who had also been the owner, and it was held by Sir William Scott, that the transfer was colourable and void, and he condemned both ship and cargo. If, however, the transfer be *bonâ fide*, and the vessel becomes neutral property, it may be employed in all trade in which neutrals may lawfully engage.[2]

Transfer of ships

§ 16. Regularity of papers, in such cases, is not conclusive evidence of ownership; for, as remarked by Sir William Scott, in the case of the 'Odin,' where there is an intention to deceive, the regularity of the paper documents is a necessary part of the apparatus and machinery of the fraud. Although regular documents, if duly verified and supported, are pre-

Regularity of papers not conclusive

[1] The 'Franklin,' 6 *Rob.*, 127; the 'Fortuna,' 1 *Rob.*, 211.

The liability of property (the product of an enemy's country, and coming from it during war) to seizure is irrespective of the *status domicilii*, guilt or innocence of the owner. These principles apply to property held, before the war, in partnership, as well as to that held in severalty. The war dissolves the partnership. (The 'Dashwood,' 5 *Wall.*, 170; the 'Gray Jacket,' *ibid.* 342; the 'William Bagaley,' *ibid.* 377. But see 'Fifty-two Bales of Cotton,' *suprà*, p. 127.)

The property of a commercial house, established in the enemy's country, is subject to seizure and condemnation as prize, though some of the partners may have a neutral domicile. (The 'Cheshire,' 3 *Wall.*, 231.)

[2] Wildman, *Int. Law*, vol. ii. p. 83; the 'Omnibus,' 6 *Rob.*, 71; the 'Jemmy,' 4 *Rob.*, 31. The transfer, during war, of a ship of war, by an enemy to a neutral, is illegal (the 'Packet de Bilboa,' 2 *Rob.*, 133; the 'Georgia,' 1 *Low.*, 96).

sumptive evidence, yet, if the circumstances and facts of the case lead justly to the conclusion that these papers, however formal, are themselves false, the court will not be bound by them. Where the papers say one thing, and the facts of the case another, the court will exercise a sound judgment as to which the preponderance is due. It has already been stated that, although a vessel be documented as a neutral vessel, it will not be protected by its documents, if the domicile of its owner is hostile. A government may grant the privilege of a national character to vessels for the purpose of its own navigation, but cannot change its national character, to the prejudice of third parties. Consequently, if the real owner of the vessel engaged in trade with the enemy be a subject of one of the belligerents, its apparent neutral character will not save it from condemnation.[1]

Trade by stranger in enemy's country

§ 17. When the trading is from a port of the belligerent, claiming the right of capture, the property is, as a general rule, liable to confiscation, if the owner at the inception of the voyage was a resident in the country, whether as a native subject, a domiciled merchant, a mere stranger, or a sojourner. Every person in a country (with the limited exception of ambassadors, &c.), whether a native or stranger, owes obedience to its laws, and the rule of international jurisprudence, which forbids all intercourse and trade with the public enemy, is just as obligatory upon him as the municipal laws of revenue or regulations of police. We have already stated under what circumstances the property of a resident in an enemy's country is to be deemed hostile; the same circumstances, as a general rule, are sufficient to justify that enemy to treat it as the property of his own subjects, and to subject it to like penalties.[2]

Distinction as to native subject

§ 18. There exists, however, an important distinction between the case of a native subject and that of a domiciled stranger or mere sojourner. 'The property of the subject,' says Mr. Duer, 'where the trade was illegal in its origin and intent, cannot be redeemed from its guilt and penalty by any subsequent change of his own residence; but that of the domiciled merchant or stranger will be restored, if, previous to its capture, he had, in part, removed from the belligerent

[1] The 'Odin,' 1 *Rob.*, 252, 253; the 'President,' 5 *Rob.*, 277; Tolard *v.* Bell, 8 *Term. R.*, 434; as to ships' papers, see ch. xxii. § 19.

[2] Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. xiv.

country, with the intention of returning to his own; for, in this case, the illegality that arose solely from his local and temporary allegiance, by the removal of its cause, has ceased to exist.' This distinction has been established in a number of decisions, both in the United States and in England. In the case of the 'Indian Chief,' Mr. Johnson, one of the claimants, was an American citizen in his native character, but had resided and was engaged in trade in England, and was still living there, when the ship which he claimed as owner, and which was seized as engaged in a trade with the enemy, commenced her voyage. But as it was clearly proved that he had left England for the United States, and with the *bonâ fide* intention of resuming his native character, before the seizure, his claim was allowed and the ship restored. Again, in the case of the 'Etrusco,' the claimant was a Swiss by birth, but had been impressed with a French hostile character, by trading under the protection of a French factory in China, and such was his character when the goods were shipped; but he had fortunately quitted China before the capture, and upon this ground the Lords of Admiralty decreed a restoration. In the case of the 'Ocean,' the only act upon which Sir William Scott relied, as evidence of the intention of the party, was, that he had made arrangements for withdrawing himself as a partner from a house of trade in the hostile country, and if he is able to show that the evidence on which the captors rely, as fixing his character, had been changed in fact, or in judgment of law, previous to capture, his claim to restitution will be allowed. In the judgment of Chief Justice Marshall, dissolution of partnership, discontinuance of trade in the enemy's country, and other arrangements obviously preparatory to a change of residence, ought all to be considered overt acts, which, when performed in good faith, entitle the claimant to restitution. This seems an important exception to the general rule, that the national character of property on the ocean cannot be changed *in transitu* during the prosecution of the voyage.[1]

Acceptance of license from enemy

§ 19. If a vessel belonging to one of the belligerents prosecutes a voyage, even to a neutral port, under a license from the government of the enemy, both ship and cargo, while they

[1] Duer, *On Insurance*, vol. i. pp. 515–517, 544, 545, 576; the 'Indian Chief,' 3 *Rob.*, 18–21; the 'Ocean,' 5 *Rob.*, 91; the 'Etrusco,' 3 *Rob.*, 31; the 'Portland,' 3 *Rob.*, 41.

remain under the protection of such license, are liable to capture and confiscation. Such condemnation results from the presumption, not to be resisted, that the license is granted by the enemy for the furtherance of his own interests, and the citizen or subject who lends himself to the promotion of that object, by accepting such license, violates the plainest duties of his own allegiance. As has already been stated, individual members, composing the state or body politic, are prohibited from all commerical intercourse with the public enemy, unless sanctioned by the express authority of their own government. In the words of Sir William Scott, no principle should be held more sacred than that an intercourse with the enemy ought not to be allowed to subsist on any other footing than that of the direct permission of the State. The reasons of this rule are fully set forth in the opinion of Mr. Justice Story, in the case of the 'Julia,'[1] which opinion was adopted *in extenso* by

[1] In 1812 the brig 'Julia' and cargo, owned by American citizens, was captured by the United States frigate 'Chesapeake.' The vessel had on board a license, from the English admiral at Halifax, directing all his Majesty's ships to suffer her to proceed without unnecessary molestation, and reciting that she was well-inclined towards the British interest, and was laden with provisions for the use of the allied armies in the Peninsula. She was captured on her return journey, having disposed of the provisions, and then bearing a cargo of salt. Two questions were raised: 1st, whether the use of an enemy's license, or protection on a voyage to a neutral country in alliance with the enemy, be illegal, so as to affect the property with confiscation; 2nd, if not, whether the terms of the existing license distinguish this case unfavourably from the general principle. The Supreme Court of the United States distinguished this case from that of the 'Elizabeth' (5 *Rob.*, 2), inasmuch as the vessel and cargo were documented as American, and not as British property; further, it decided that the existence of a license affords strong presumption of a concealed enemy's interest; that no argument in favour of a license can be drawn from the safe-conduct to enemies' fishing vessels in former times; that it is not universally true, that a destination to a neutral port gives a *bonâ fide* character to the voyage; that if the property be ultimately destined for an enemy's port, or an enemy's use, the interposition of a neutral port would not save it from condemnation; that if property be engaged in an illegal traffic with the enemy, or even in an attempt to trade, it is liable to confiscation as well on the return as on the outward voyage; and, that it may be assumed as a proposition liable to few, if any, exceptions, that the property which is rendered auxiliary or subservient to enemy interests becomes tainted with forfeiture (the 'Julia,' 8 *Cranch.*, 181; 1 *Gall. R.*, 601). Sailing under an enemy's license is legal cause for the forfeiture of a neutral vessel (the 'Alliance,' *Blatchf. Pr. Cas.*, 262). But the fact that a vessel carried a custom-house clearance and permit to pass fortifications, issued by the Confederate Government in 1860, was held in the courts of the United States not to be of itself a justifiable cause for capture; the papers did not profess to protect from arrest at sea, nor were they calculated to mislead the captors (the 'Sarah Starr,'

the Supreme Court of the United States. At the threshold of his opinion, he lays down the fundamental proposition that, in war, all intercourse between the subjects and citizens of the belligerent countries is illegal, unless sanctioned by the authority of the government, or in the exercise of the rights of humanity; that a personal license from an enemy must be regarded as an implied agreement with such enemy, that the holder of such license will conduct himself in a neutral manner, and avoid any hostile acts towards such enemy; that it is, therefore, a violation of the laws of war, and of his duties to his own government.

Trade with possessions and colonies of enemy

§ 20. The unlawfulness of trade with the enemy extends not only to every place within his dominions, and subject to his government, but also to all places in his possession or military occupation, even though such occupation has not ripened into a conquest, or changed the national character of the inhabitants. In each case there is the same hazard to the State, and, if the hostile occupation is known when the communication is attempted, there is the same breach of duty on the part of the subject. The reasons of public policy, which forbid such intercourse, apply as fully in the one case as in the other. The same rule holds even in the case of a revolted territory, or colony of the enemy, which is known to have been for years in the hands of the insurgents: courts of justice always regard such revolted territory as belonging to the enemy, until, by some public act of their own government, it is expressly recognised as an independent and friendly power. Until such express recognition, courts must regard the revolted territory as a subsisting part of the parent State, with its former relations unaltered.[1]

Rule of insurance

§ 21. It may be stated, as a general rule, that any insurance, on either vessel or cargo, engaged in illegal trade with

Blatchf. Pr. Cas., 69). A neutral sailing under the flag of the enemy is considered as enemy property, and is liable to confiscation *jure belli* (U.S. *v.* the 'Telegrafo,' 1 *Newb.*, 383).

[1] Phillips, *On Insurance*, vol. i. p. 82; the 'Manilla,' 1 *Edw. Ad. Rep.*, 3; the 'Pelican,' 1 *Edw. Ad. Rep.*, Appen. D; Johnson *v.* Greaves, 2 *Fount. Rep.*, 344; Blackburne *v.* Thompson, 15 *East.*, 81; Rose *v.* Himely, 4 *Cranch.*, 272; Gelston *v.* Hoyt, 13 *Johns. R.*, 587; the 'Phœnix,' 5 *Rob.*, 21; the 'President,' *ibid.* 277; the 'Indian Chief,' 3 *Rob.*, 12; the 'Fama,' 5 *Rob.*, 106; the 'Boletta,' 1 *Edw. Rep.*, 171; Hagedorn *v.* Bell, 1 *Maule and Sel.*, 450; Bromley *v.* Hesseltine, 1 *Camp.*, 75; Bentzon *v.* Boyle, 9 *Cranch.*, 191.

the enemy, is illegal, and whenever the goods or vessel are liable to condemnation, the policy of insurance will be declared void. Where the property insured is justly liable to belligerent capture, whether the *delictum*, that is, the substantive cause of condemnation, exists at the inception of the voyage, or occurs subsequently, but prior to the time the policy attaches, it is considered to be illegal, and is declared void. There are, however, on this question conflicting opinions and decisions, the examination of which does not come within the purpose and object of this work.[1]

[1] Arnould, *On Insurance*, pt. iii. ch. i. sec. 7; Bedarride, *Droit Maritime*, §§ 1095 et seq.; Wildman, *Int. Law*, vol. ii. p. 259; Phillimore, *On Int. Law*, vol. iii. § 69; Duer, *On Insurance*, vol. i. p. 587; the 'Aurora,' 8 *Cranch.*, 441; the 'Hiram,' 1 *Wheaton. R.*, 440; the 'Ariadne,' 2 *Wheat. R.*, 143; Colquhoun *v.* N. Y. F. Insurance Co., 15 *Johns. R.*, 357; Ogden *v.* Barker, *Johns. R.*, 87; Craig *v.* U. S. Ins. Co., 1 *Peter. C. C. R.*, p. 410. There can be no return of the premium of a maritime assurance to the assured, if the insurance be illegal and the voyage performed, unless the assured did not know of the illegality, or had rescinded the contract before the voyage had commenced (Oom *v.* Bruce, 12 *East.*, 225; Hentig *v.* Staniforth, 5 *M. and S.*, 122; Lowry *v.* Bourdien, *Dougl.*, 468; Aubert *v.* Walsh, 3 *Taunt.*, 280; Palyart *v.* Leckie, 6 *M. and S.*, 290). A prospectus of the Société Réparatrice de l'Invasion, assuring against requisitions, pillage, and incendiarism, was circulated in Normandy. On the Prussian side, a syndicate of bankers was formed for advancing money to towns unable to meet requisitions and contributions. Four million francs were advanced to Nancy through this channel. A policy of insurance which indemnifies an enemy against loss in time of war is unlawful, and, where entered into before hostilities, is abrogated when they occur (Tait *v.* N. Y. Life Ins. Co., 19 *Int. Rev. Rec.*, 14). See, further, some cases to the contrary: Seton *v.* Low, 1 *Johns.* (*N. Y.*) *Cases*, 1, a neutral trading in contraband; the 'Helen,' 1 *L. R.* (*Admir.*), 1, the wages of a blockade-runner; and *ex parte* Chavasse, *In re Grazebrook* (34 *L. J. N. S. Bank.*, 17), the importation of contraband by neutral.

CHAPTER XXIV

RIGHTS AND DUTIES OF NEUTRALS

1. Neutrality in war—2. Qualified neutrality—3. Advantages and resulting duties of neutrality—4. Hostilities not allowed within neutral jurisdiction—5. Passage of troops through neutral territory—6. Pretended exception to inviolability of neutral territory—7. Opinions of publicists—8. Neutral ports and the Suez Canal—9. Right of asylum—10. Presumptive right of entry—11. Armed cruisers in neutral waters—12. Belligerent ships and troops in neutral ports and territory—13. The 'Alabama' case—14. Arming vessels and enlisting troops—15. Loans of money by neutrals—16. Pursuit of enemy from neutral port—17. Passage over neutral waters—18. Municipal laws in favour of neutrality—19. Laws of United States—20. Foreign Enlistment Act—21. Protection of neutral inviolability—22. Claim for restitution—23. If captured property be in possession of a neutral—24. Power and jurisdiction of federal courts—25. Purchasers in foreign ports—26. If condemned in captor's country—27. Illegal equipment—28. Case of Arbuthnot and Ambrister.

Neutrality in war

§ 1. NEUTRALS in a war are those who take no part in it, but remain the common friends of the belligerents, favouring the arms of neither to the detriment of the others. 'The neutral,' says Phillimore, 'is justly and happily designated by the Latin expression *in bello medius*. It is of the essence of his character that he so retain this central position as to incline to neither belligerent. He has no *jus bellicum* himself, but he is entitled to the continuance of his ordinary *jus pacis*, with, as will presently be seen, certain curtailments and modifications which flow from the altered state of the general relations of all countries in time of war.' According to Bynkershoek, he has nothing to do with the justice or injustice of the war, and can show no favours to one party in preference to another. The error of Grotius, copied by Vattel, in this respect, has not been followed by subsequent writers. All independent sovereign States have the right to remain neutral in a war, unless otherwise bound by treaties of alliance previously entered into. It is not necessary that

they should make any proclamation or public declaration of neutrality; the legal presumption is, that their pacific *status* continues, unless they declare to the contrary.[1]

Qualified neutrality

§ 2. There is, however, a qualified neutrality which forms an exception to this definition; it arises out of antecedent engagements, by which the neutral State has bound itself to one of the parties of the war, to furnish a limited succour, or to extend certain privileges. The fulfilment of such an engagement, entered into prior to the commencement of hostilities, does not necessarily forfeit the neutral character of a State, nor render it the enemy of the other belligerent party, because it does not render the neutral the general associate of the belligerent to whom the succour or privilege is due. Denmark, in consequence of a previous treaty, furnished limited succours in ships and troops to Russia, in 1788, against Sweden, and by the treaty of amity and commerce between the United States and France, in 1778, the latter secured to herself the special privilege of the admission for her privateers, with their prizes, into American ports, to the exclusion of her enemies. To furnish succours or auxiliaries, or to extend privileges to one belligerent, to the detriment of the other, is undoubtedly a violation of strict neutrality, and, as such, is a just cause of complaint, if not of war. The peculiarity of the position of Switzerland, hemmed in on all sides by States having a direct interest in maintaining her neutrality, has generally prevented complaints against her for her former practice of furnishing a limited number of troops to one or more of the parties to a war. If she had been a commercial or maritime State, says Massé, a different rule would undoubtedly have been applied to this singular state of things. There can be no question that her conduct, in this respect, was a violation of her neutrality. But it would be pedantically rigid to consider, as a violation of neutrality, the allowing prizes captured by one belligerent to be brought into the neutral port, especially in compliance with the provisions of a treaty made antecedently to the war. How far a neutrality, thus qualified and limited, may be tolerated by the belligerent against whom the partiality is shown, is a question of expediency rather than

[1] See ch. xix. § 15.

of right, and is generally governed by political circumstances.[1]

Neutrality must be observed and enforced

§ 3. States, not parties to a war, have not only the right to remain neutral during its continuance, but to do so conduces greatly to their advantage, as they thereby preserve to their citizens the blessings of peace and commerce. Moreover, the belligerents are interested in maintaining the just rights of neutrals, as the trade and intercourse kept up by them greatly contribute to mitigate the evils of war. It has, therefore, become an established principle of international law that neutrals shall be permitted to carry on their accustomed trade, with such restrictions only as are necessary for the security of the established rights of the belligerents. Although the neutral State is considered as continuing to occupy toward the belligerents the same general position as before the war, its relations with them are very different; neutrality is not properly a continuation of the former state of peace (*'la continuation de l'état antérieur de paix'*); for, to neutrals, war brings certain advantages and disadvantages, and imposes upon them new and peculiar duties. While, in some respects, their trade and commerce may be increased in extent and profit, it is restricted with respect to blockades and sieges, and the carrying of contraband, and their vessels are subjected to the inconvenience and annoyance of visit and search. Not only are they obliged to maintain strict impartiality towards the belligerents, but they are bound to prevent or punish any violation of their rights of neutrality by either of the parties at war with each other. These duties of neutrality extend not only to preventing the arming of cruisers in neutral ports, and the enlistment of men in neutral

[1] Phillimore, *On Int. Law*, vol. iii. §§ 136, 179; Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. xvii.; Vattel, *Droit des Gens*, liv. iii. ch. vii. § 113; Massé, *Droit Commercial*, liv. ii. tit. i. ch. ii. § 2; Heffter, *Droit International*, §§ 144–146; Waite, *State Papers*, vol. i. pp. 140, 169–172; Hautefeuille, *Des Nations Neutres*, tit. iv. ch. i.; Eggers, *Leben von Bernstorf*, 2 ob. pp. 118–195; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. ix.

On the commencement of the Franco-Prussian War, 1870, the Emperor Napoleon III. decided not to receive, either at the Imperial headquarters or at the headquarters of the corps-d'armée, any volunteer, foreign officer, or person not belonging to the army (*Journal Officiel*, July 19, 1870); and the British Government refused permission to an officer in her Majesty's service to join the Prussian army as correspondent to the *Times*.

territory, but also to the general sanctity of neutral jurisdiction, by redressing all injuries which one belligerent may commit upon the other within its limits.[1]

[1] See *post.*, § 13; Hubner, *De la Saisie des Bâtiments neutres*, pt. ii. ch. ii. § 2; Azuni, *Droit Maritime*, tome ii. pp. 53, 69; Tetens, *Sur les Droits*, p. 34; Ortolan, *Diplomatie de la Mer*, t. ii. ch. viii.; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. xiv. A neutral State is not bound by the law of nations to impede or diminish its own trade by municipal restrictions. A neutral merchant may ship goods prohibited *jure belli*, and they may be rightfully seized and condemned. It is one of the cases where two 'conflicting rights' exist which either party may exercise without charging the other with doing wrong. As the transport is not prohibited by the laws of the neutral sovereign, his subjects may lawfully be concerned in it, and as the right of war lawfully authorises a belligerent power to seize and condemn the goods, he may lawfully do it. Whatever is not prohibited by the positive law of a country is lawful. Although the law of nations is part of the municipal law of England, and it may be said that by that law contraband trade is prohibited to neutrals, and consequently unlawful, yet the law of nations does not declare the trade to be unlawful. It only authorises the seizure of the contraband articles by the belligerent powers. (The 'Helen,' 35 *Law J.*, N.S., *Adm.*, 2; compare with it the 'Santissima Trinidad,' 17 *Wheat. Adm. R.*, 284; Richardson *v.* Marine Insurance Co., 6 *Massa. R.*, 113; Seton and others *v.* Low, 1 *Johns. R.*, *Ex parte Chavasse*, 34 *Law J.*, N.S, *Chanc.*, 17.)

With respect to the rights of neutral individuals residing in a belligerent territory, in 1870, during the Franco-German War, the British law officers were of opinion that British subjects having property in France were not entitled to any special protection for their property, or to exemption from military contributions to which they might be liable in common with the inhabitants of the place in which they resided, or in which their property might be situated. On complaint made to Lord Granville in 1870 by a family of British subjects, residing in the Commune of La Ferté Imbault, in France, of having suffered pillage, menaces, and ill-treatment at the hands of the Prussian troops, although they had hoisted the British flag over the gate of their château, trusting that a neutral flag would have protected their persons and property, his lordship replied that, much as her Majesty's Government regretted the inconvenience and loss to which they had been subjected, it was out of their power to obtain for them any redress, for reasons in conformity with the above opinion. In the case of a complaint to Lord Granville by Lawrence Smith, of St. Ouen, that, though the English flag was flying over his house, Prussian soldiers were quartered on him, that he was robbed of all his provisions, that a volley was wantonly fired into a cellar where his family had taken refuge, his house set on fire, and his family driven away half dressed into a wood in the snow, his lordship replied that her Majesty's Government did not consider in strict right they would be entitled to claim compensation from the Prussian Government, but that it appeared the destruction of the property was an act of wanton violence on the part of the Prussian troops, resulting from lax discipline. In such case he was of opinion that the facts might be brought officially to the notice of the German Government, expressing the hope that they would think fit to direct an inquiry to be made by the military authorities, and that they would, as an act of justice, award compensation for the injuries wantonly inflicted. The British law officers were of opinion that British subjects residing in France had no just cause of complaint against the French authorities in the event of their property being destroyed by an invading army.

§ 4. The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in territory belonging to no one. Hostilities cannot be lawfully exercised within the territorial jurisdiction of the neutral State which is the common friend of both parties.[1] To grant any such right to one would be a detriment to the other, and

No hostilities to be permitted within neutral jurisdiction

Upon the breaking out of war between the United States and the Republic of Mexico, in 1845, the province or department of Yucatan, belonging to Mexico, having assumed a flag of her own, and having manifested a determination to remain neutral, a special order was issued by the President of the United States exempting her citizens from the operation of the laws of war. Under such circumstances, no citizen or resident of Yucatan could with impunity violate her neutrality, by assuming for the purposes of trade the flag of the enemy. (United States *v.* the 'Telegrafo,' 1 *Newb.*, 383.)

[1] The United States complained to the Peruvian Government, in 1881, that the latter power, during the then war with Chili, had made use of boats containing explosive materials, which had in some instances been sent adrift on the chance of their being fallen in with by some of the Chilian blockading squadrons, and considered that 'this practice must be fraught with danger to neutral vessels entitled to protection under the law of nations, and that, in case American vessels are injured thereby, this Government can do no less than hold the Government of Peru responsible for any damage which may be thus occasioned.'

The following declaration was issued by the Commander-in-Chief of the Military District of Odessa (published in the *London Gazette* by order of the British Foreign Office, May 17, 1877):—(Translation) 'The Commander of the troops of the Military District of Odessa, Chief of the Coast Defences of the District, General Aide-de-Camp Séméka, has the honour of notifying that, in consequence of the laying of torpedoes, ships of neutral States, requested to withdraw in view of a bombardment, cannot do so except on condition of being piloted by Russian officers through the passages left between the torpedoes; but as this operation, carried out in the face of the enemy, might point out to them the position of these passages and enable them to make use of them, thereby depriving the town of its most important line of defence, General Aide-de-Camp Séméka, in view of a state of affairs new in maritime warfare, and consequently not foreseen by international law, has the honour to request the enemy's ships of war to withdraw out of sight for the time necessary for the removal of neutral ships (namely, for — hours), warning them that, if they do not agree to this demand, neutral ships will not be allowed out, and the Imperial Russian Government declines all responsibility for the consequences.'

Notice sent to her Britannic Majesty's Consul at Taganrog by the Governor of that place, with the assurance that every assistance would be afforded to foreign vessels of friendly neutral powers on their passage at the respective ports, in order that trade might not be impeded (published in the *London Gazette* by order of the British Foreign Office, May 17, 1877):—(Translation) 'Approved by the Commander of the Odessa Military Department, April 12, 1877. From the time of the declaration of war, 12–24 April, 1877, the entrance of and departure of vessels from the port of Odessa, from Liman of the Dnieper, and from the Boug, the Straits of Kertch, and the Bay of Sebastopol, are only permitted subject to the following conditions, which are not provided for by maritime international law, but which must necessarily arise, now that

to extend the privilege to both would necessarily make the neutral territory the theatre of hostile operations, and involve the State in the consequences of the war. Hence, every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful, and the party so trespassing is liable to be treated as an enemy, unless full satisfaction is made for such violation of neutral rights.[1]

Passage of troops through neutral territory

§ 5. It was contended by some of the ancient publicists that a belligerent had an absolute right of passage for his troops through neutral territory, and that the neutral could not refuse it without injustice. Vattel contends that such *innocent passage* through neutral territory may be granted or refused by neutral power, at its discretion ; that, if refused, the applicant has no cause of complaint, and if granted, the opposite party can only claim the same privilege for his own troops. Many modern writers, and the German publicists generally, have pronounced in favour of the views of Vattel. But Heffter, Hautefeuille, Manning, and others, express the opinion that to grant such passage is a violation of neutral duty, and affords just cause of complaint, if not of war, to the other belligerent. This opinion seems most consonant with the general principles of neutrality. But admitting the right

harbours are protected by barring them with mines, the passage through which is kept absolutely secret :—

'1. Every vessel, on arriving, must stop outside the line of mines. Russian officers with a crew will go and meet her ; they will assume command of the said vessel, and navigate her in the harbour, after having satisfied themselves that the ship's papers are in regular order.

'2. The captain of the said vessel shall engage, in writing, on behalf of himself and his crew and passengers, that, while passing through the line of torpedoes, no person shall remain on the bridge, or watch through port-holes or other openings the course followed by the ship.

'3. The same rule shall be enforced when merchantmen quit the harbour ; that is to say, a Russian officer and crew shall, in conformity with Articles 1 and 2, take command of the said vessels.

'4. If a man-of-war should make its appearance at a spot whence it would be possible to watch the entry and departure of vessels, the Russian authorities will insist upon its retiring to a certain distance during a period of time sufficient to navigate a vessel in or out. Until this formality is complied with no vessel will be allowed to enter or leave.'

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 7 ; Wolfius, *Jus Gentium*, § 687 ; Martens, *Précis du Droit des Gens*, §§ 310, 311 ; Hautefeuille, *Des Nations Neutres*, tit. vi. ch. i. Treaties were entered into, during the Franco-German War, 1870, by and between England, France, and Prussia for the purpose of preserving the neutrality of Belgium during that war. These treaties were to last for twelve months after the ratification of any treaty of peace.

of the neutral State to make such agreement, it follows that if it grant or refuse passage to one of the parties to the war, it is bound, in like manner, to grant or refuse it to all the other parties, unless the alteration of circumstances, or some special reason, should of itself form a justification for acting otherwise. Without solid and satisfactory reasons, to grant passage to one belligerent and refuse it to another, would be showing partiality, and receding from a position of strict neutrality. The grant of passage includes all those things without which the passage would not be practicable, such as the liberty of carrying whatever may be necessary for the passing army, and that of maintaining discipline among the troops. Moreover, he who grants a passage is bound, so far as lies in his power, to make it safe from attack; for, otherwise, it would be drawing those who pass into a snare, which would be a breach of good faith. Whether the troops are to pass with or without arms, and whether they are to be permitted to purchase supplies in the country passed over, or to carry their provisions with them, will, in general, be specified in the grant of passage, and if not specified such permission will be presumed. Troops, to whom a passage is granted through a neutral territory, are bound to observe the most exact discipline, to occasion no damage to the country passed over, to keep the public roads, and not to enter the houses or lands of private persons, and to punctually pay for whatever is purchased of the inhabitants. The State to which the troops belong is held strictly accountable for any damage to public or private property. Moreover, they cannot make the neutral border a shelter for making preparations to attack the enemy, nor, when defeated, an asylum in which to lie by and watch their opportunity for further contest. This would be making the neutral country directly auxiliary to the war, and to the comfort and support of one of the belligerents. Such conduct would be good cause for the neutral State to revoke the grant, and compel the offender to immediately leave its territory.[1]

[1] Vattel, *Droit des Gens*, liv. iii. ch. vii. §§ 133, 134; Bello, *Derecho Internacional*, pt. ii. cap. vii. §§ 5, 6; Moser, *Versuch*, &c., b. x. c. i. pp. 238 et seq.; Manning, *Law of Nations*, pp. 182–186; Heffter, *Droit International*, § 147; Hautefeuille, *Des Nations Neutres*, tit. v. ch. i. During the struggle between France and China in 1885 the Chinese complained to England that Hong Kong was used by the French as a base

Pretended exception of Bynkershoek

§ 6. Bynkershoek makes one exception to the general inviolability of neutral territory, and contends that if a belligerent should be attacked on hostile ground, or in the open sea, and should flee within the jurisdiction of a neutral State, the victor may pursue him *dum fervet opus*, and seize his prize within the neutral State. He rests his opinion entirely on the authority and practice of the Dutch, and not on the usage of any other nation. Casaregis expresses the same opinion, and, relying on the practice or law observed in the chase of animals, maintains that if a naval fight has commenced on the high seas, a belligerent may pursue and capture the ship of his enemy, even under the cannon, and within the jurisdiction of a neutral power. But, in a subsequent discourse, he adopts a contrary opinion with respect to the protection afforded to belligerent vessels in neutral ports.[1]

Opinions of writers on public law

§ 7. But Bynkershoek is not supported by the practice of nations. Some writers on public law maintain the sounder doctrine, that when the flying enemy has entered neutral territory, he is placed immediately under the protection of the neutral power, and that there is no exception to the rule that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. The government of the United States has invariably claimed the absolute inviolation of neutral territory. This question was elaborately discussed in the case of the 'Caroline.'[2]

Neutral ports and the Suez Canal

§ 8. A neutral State, by virtue of its general right of police over its ports, harbours, and coasts, may impose such restrictions upon belligerent vessels, which come within its jurisdic-

of operations. This caused England to enforce the provisions of the Foreign Enlistment Act against France. There had never been a declaration of war between France and China; the two nations had been belligerents in everything but name; but England considered the blockade of Formosa tantamount to such a declaration.

During the Franco-German War, in 1870, between 60,000 and 70,000 French troops crossed into Switzerland. They were disarmed and interned by order of the Swiss Government. The sick and wounded among them were not sent back to the French army.

[1] Bynkershoek, *Q. J. Pub.*, lib. i. cap. viii.; Casaregis, *De Commercio*, disc. xxiv. n. ii. and disc. clxxiv. n. xi.; the 'Anna,' 5 *Rob. R.*, p. 348.

[2] The case of the 'Caroline,' ch. xiv. § 20; Abreu, *Sobre las Presas*, pt. i. c. iv. § 15; Valin, *Traité des Prises*, ch. iv. § 3; Azuni, *Droit Maritime*, pt. i. c. iv. § 1; Vattel, *Droit des Gens*, liv. iii. ch. vii. §§ 132, 133; the 'Anna Catharina,' 5 *Rob. R.*, p. 15; Martens, *Précis du Droit des Gens*, §§ 310 et seq.; Phillimore, *On Int. Law*, vol. iii. § 154; Manning, *Law of Nations*, pp. 186, 386.

tion, as may be deemed necessary for its own neutrality and peace, and so long as such restrictions are impartially imposed upon all the belligerent powers, neither can have any right to complain. This right is frequently exercised in prohibiting all armed cruisers with prizes to enter such neutral ports and waters, and, even without prizes, to obtain provisions and supplies. This usage is shown by marine ordinances and text-writers of different nations.[1] In 1877 M. de Lesseps, the engineer of the Suez Canal, proposed to the British Government that this canal should be neutralised; but the project was not then adopted. The matter was again considered in 1883, and after considerable negotiations between Great Britain and the various Powers a Convention was approved on behalf of Great Britain and France in 1887, and was subsequently accepted by Austria, Germany, Italy, Russia, Spain, the Netherlands, and Turkey in 1888.[2]

[1] Heffter, *Droit International*, §§ 146–150; Ortolan, *Diplomatie de la Mer*, tome ii. ch. viii.; Bello, *Derecho Internacional*, pt. ii. cap. vii. § 6; Hautefeuille, *Des Nations Neutres*, tit. vi. ch. ii.

[2] This Convention (*inter alia*) declares: (Art. 1) 'The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag. Consequently, the High Contracting Parties agree not in any way to interfere with the free use of the Canal, in time of war or in time of peace. The Canal shall never be subjected to the exercise of the right of blockade. (Art. 2) The High Contracting Parties, recognising that the Fresh-Water Canal is indispensable to the Maritime Canal, take note of the engagements of his Highness the Khedive towards the Universal Suez Canal Company as regards the Fresh-Water Canal, which engagements are stipulated in a Convention bearing the date March 18, 1863, containing an *exposé* and four articles. They undertake not to interfere in any way with the security of that Canal and its branches, the working of which shall not be exposed to any attempt at obstruction. (Art. 3) The High Contracting Parties likewise undertake to respect the plant, establishments, buildings, and works of the Maritime Canal and of the Fresh-Water Canal. (Art. 4) The Maritime Canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article 1 of the present Treaty, the High Contracting Parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the Canal, shall be committed in the Canal and its ports of access, as well as within a radius of three marine miles from those ports, even though the Ottoman Empire should be one of the belligerent Powers. Vessels of war of belligerents shall not revictual or take in stores in the Canal and its ports of access, except in so far as may be strictly necessary. The transit of the aforesaid vessels through the Canal shall be effected with the least possible delay, in accordance with the regulations in force, and without any other intermission than that resulting from the necessities of the service. Their stay at Port Saïd and in the roadstead of Suez shall not exceed twenty-four hours, except in case of distress. In such

Right of asylum

§ 9. This restriction, imposed by neutrals upon the vessels of belligerents which come into their ports, is never extended to deny the rights of hospitality in case of immediate danger and want. Armed cruisers, privateers, and the prizes of either may anchor within a neutral port as a shelter from the attacks of an enemy, to avoid the dangers of a storm, or to supply themselves with water, provisions, and other articles of pressing necessity. Asylum, to this extent, is required by the common laws of humanity, to be afforded in neutral ports. But beyond this, there is no right of asylum which the neutral may not withhold equally from all belligerents. It may prevent any free communication with the land, and, so soon as such vessels have supplied their immediate wants, the neutral may compel them to depart from its jurisdiction. Such restrictions were imposed by the Two Sicilies in 1740 and 1756, and by Sardinia in 1778, and they are supported by authority.[1]

When this right is presumed

§ 10. But while the neutral State may, by proclamation or otherwise, prohibit belligerent vessels with prizes or prisoners of war from entering its ports, the absence of any such prohibition implies the right to enter for the purposes indicated, and any vessel so entering neutral waters, retains her right of extra-territoriality, both with respect to her prisoners of war and her prizes. This question was raised in the port of San

case they shall be bound to leave as soon as possible. An interval of twenty-four hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile Power. (Art. 5) In time of war belligerent Powers shall not disembark nor embark within the Canal and its ports of access either troops, munitions, or materials of war; but, in case of an accidental hindrance in the Canal, may be embarked or disembarked at the ports of access by detachments not exceeding 1,000 men, with a corresponding amount of war material. (Art. 6) Prizes shall be subjected, in all respects, to the same rules as the vessels of war of belligerents.'

[1] Kent, *Com. on Am. Law*, vol. i. pp. 120, 121. Therefore, although the United States may not have entered into any treaty with either of two belligerents, to accord asylum to its vessels, yet if they have not given any notice that they will not do so, the ports of the United States are to be deemed open to such ships. (7 *Op. Att.-Gen.*, 122.)

In May 1865 the United States declared that if, after a reasonable time should have elapsed for the proclamation to become known in the ports of nations claiming to be neutral, the insurgent cruisers should continue to receive hospitality in such ports, the Government would deem itself justified in refusing hospitality to the public vessels of such nations in ports of the United States, and in adopting such other measures as might be deemed advisable for vindicating the national sovereignty.

Francisco, California, in the case of the Russian vessel the 'Sitka,' a prize of the British navy, during the Crimean war.[1]

Duties of belligerents while in neutral waters

§ 11. The armed cruisers of belligerents, while within the jurisdiction of a neutral State, are bound to abstain from any acts of hostility towards the subjects, vessels, or other property of their enemies; they cannot increase their guns or military stores, or augment their crews, not even by the enrolment of their own countrymen; they can employ neither force nor stratagem to recover prizes, or to rescue prisoners in the possession of the enemy; nor can they use a neutral port, or waters within neutral jurisdiction, either for the purpose of hindering the approach of vessels of any nation whatever, or for the purpose of attacking those which depart from the ports or shores of neutral powers. No proximate acts of war, such as a ship stationing herself within the neutral line, and sending out her boats on hostile enterprises, can, in any manner, be allowed to originate in neutral territory; nor can any measure be taken that will lead to immediate violence.[2]

Distinction in regard to asylum to troops

§ 12. Publicists make a marked distinction between the duties of neutrals, with respect to the asylum which may be

[1] Cushing, *Opinions of U.S. Attys.-Genl.*, vol. vii. p. 123; Loccenius, *De Jure Maritimo*, lib. ii. ch. iv. § 7; also see vol. i. ch. vii. § 24.

[2] Chitty's *Com. Law*, vol. i. pp. 441–444; 'Twee Gebroeders,' 3 *Rob. R.*, pp. 163–326; Vattel, *Law of Nations* (Chitty, 1834), p. 344; Martens, *Law of Nations*, b. viii. c. 6, § 6; the 'Anna,' 5 *Rob.*, 373; the 'Flad Oyen,' 1 *Rob.*, 115; Atcheson's *Rep.*, 8, note 9; Havelock *v.* Rockwood, *ibid.* 33, 43; Martens, *Précis du Droit des Gens* (1831), 251; Azuni, *Du Droit Maritime*, an. vi. 323; Ortolan, *Règles Inter. et Diplo.* (1845), 248; Manning, *Law of Nations*, 386; Cussy, *Causes Célèbres*; Abreu, *Prises Maritimes* (1758), 64; Hautefeuille, 474; Kent, *Com. on Am. Law* (1848), 123; 'Règlement par le Grand-Duc de Toscane,' 1778, in Martens, t. iv. 205; 'Edit de la République de Gênes,' 1779, in *ibid.* t. iv. 245; 'Edit de la République de Venise,' 1779, in *ibid.* t. iv. 255; Treaty of U.S. with Tripoli, 1796, Art. 8; ditto with Tunis, 1797; ditto with Tripoli, 1805.

In 1826 all belligerents were prohibited from bringing (except in cases of distress) any prize, or any part of the cargo of prizes into Gibraltar, or from making that port a *rendez-vous* for any warlike purposes.

A belligerent within a neutral port may not give notice by signals or guns to her consorts outside of the movements of an enemy.

In 1854 Spain prohibited the fitting out or admission into Spanish ports of privateers under the Russian flag.

In the same year Portugal prohibited the entrance of privateers and of prizes made by them or by a belligerent vessel into Portuguese ports, except in cases of distress.

In 1861 both France and Spain in their respective Declarations of Neutrality prohibited a belligerent vessel of war or privateer to enter or stay with prizes in the ports or roadsteads for more than twenty-four hours, except in cases of compulsory delay.

afforded to belligerent ships, and that which may be afforded to belligerent forces on land. This difference, says Heffter, results from the immunity of the flag, and the principle that ships are considered as a portion of the territory of the nation to which they belong. Hence the allowable custom of asylum in neutral waters, and the want of power in the neutral to interfere with internal organisation of such vessels, when not armed or equipped within its jurisdiction. On the other hand, troops are not a part of the territory of the nation to which they belong, nor has their flag any immunity on neutral soil. While, therefore, individuals, as such, are entitled, by the laws of humanity, to the right of asylum in neutral territory, such asylum cannot be demanded by, nor can it be granted, without a violation of neutral duty, to an army as a body. It is, consequently, the duty of the neutral to order the immediate disarming of all belligerent troops which enter neutral territory as an asylum, to cause them to release all their prisoners, and to restore all booty which they may bring with them. If he neglect to do this, he makes his own territory the theatre of war, and justifies the other belligerent in attacking such refugees within such territory, which is no longer to be regarded as neutral.[1]

§ 13. The well-known case of the 'Alabama,' and of other vessels[2] of the Confederate Government, which preyed on

[1] Heffter, *Droit International*, § 149; Kluber, *Droit des Gens*, § 208, note *b*; Ortolan, *Diplomatie de la Mer*, liv. iii. ch. viii.; Pistoye et Duverdy, *Des Prises Maritimes*, tit. i. ch. i. sec. 3; Hautefeuille, *Des Nations Neutres*, tit. vi. ch. ii.; Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. §§ 6, 7; Pando, *Derecho Internacional*, p. 465; Bello, *Derecho Internacional*, pt. ii. ch. vii. § 5; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. xvii.; De Steck, *Versuch über Handel*, p. 173; Putman, *De Jure recip. Hostes.*

[2] In 1862, during the early part of the American Civil War, a vessel was being built in England, evidently for warlike purposes, and the Federal Government of the United States drew the attention of the British Government to the fact, pointing out that it was intended for the use of the insurgent or Confederate States. The British Law Officers doubted whether the then Foreign Enlistment Act (59 Geo. III., c. 69) met the case so far as regarded the evidence adduced. Meanwhile the vessel (afterwards known as the 'Alabama') left for the Azores, then being unarmed, but she was met there by other vessels, who supplied her with men, cannon, and arms. The armament came from England, but the British authorities did not know, when it left their shores, that it was intended for the 'Alabama.' The vessel in question was then commissioned as a Confederate cruiser, and did much damage to the commerce of the United States. She put into British Colonies, on several occasions, for repairs and coal, and was treated as a ship of war belonging to a belligerent power. She was eventually destroyed by the United States

The 'Alabama' case

the commerce of the Federal States during the Civil War in the United States, in 1862, occasioned the latter Government to claim satisfaction from Great Britain on the ground of various breaches of neutrality of that country in building, equipping, and otherwise assisting the progress of those vessels. To meet these claims, after various negotiations, on the conclusion of the Civil War, the Treaty of Washington was signed at Washington, on May 8, 1871, between Great Britain and the United States, referring the various questions to five arbitrators, one being chosen by each of the following Governments, viz. Great Britain, the United States, Italy, Switzerland, and Brazil. These arbitrators met at Geneva in Switzerland on December 15, 1871. It would far exceed the limits of this work to enlarge on the many important questions discussed at the Tribunal of Arbitration, or, as it is commonly called, the Conference of Geneva; but the reader may gather a short history of the whole matter, and some of the more important subjects discussed, by a perusal of the extracts in the note below. Considerable difference of opinion prevails among jurists as to the effect which the decision of the Arbitrators has made on the general principles of International Law. It should be remembered that Austria, Holland, Germany, Russia, Spain, and other States were not represented at the Conference; and both in Great Britain and on the Continent the better opinion seems to be that oppressive and impracticable obligations, hitherto unknown to International Law, would be imposed on neutral nations if the principles set forth as the basis of the award, and the interpretation placed on the three rules of the 6th Art. of the above treaty by the majority of the arbitrators, were acceded to in future cases. On March 21, 1873, Mr. Gladstone, as Prime Minister, stated in the House of Commons, that in bringing these rules to the knowledge of other Maritime Powers, and inviting them to accede to the same, 'you have

steamer 'Kearsage,' off Cherbourg, in 1864. The 'Tuscaloosa' was her tender; this ship was seized by the British authorities at the Cape of Good Hope, and remained in their custody until the end of the Civil War.

Other ships were built in England and sold to the Confederate Government, *i.e.* the 'Florida,' known by the name of the 'Oreto,' and the 'Shenandoah,' originally a British merchant vessel known as the 'Sea King.' It was in respect of the 'Alabama,' the 'Florida,' and partially in respect of the 'Shenandoah' that the indemnity was paid by Great Britain. Claims were made, but ineffectually, by the United States in respect of the 'Nashville,' the 'Georgia,' and others.

a right to expect that we should take care that our recommendation of the three rules does not carry with it, in whole or in part, in substance or even in shadow, so far as we (the British Government) are concerned, the recitals of the Arbitrators as being of any authority in this matter.' Considerable correspondence passed between the British Government and the Government of the United States during the years 1871–74, with respect to communicating to other maritime Governments the above rules, but it was not found possible to draft a note which could meet the respective views of the two Governments.[1]

[1] It was stipulated by Art. 6 of the above Treaty as follows:—'In deciding the matters submitted to the arbitrators they shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the arbitrators shall determine to have been applicable to the case:—A neutral Government is bound—

'First. To use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of any vessel which it has reasonable ground to believe is intended to cruise or carry on war against a Power with which it is at peace, and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

'Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

'Thirdly. To exercise due diligence in its waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.'

'Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law, which were in force at the time when the claims mentioned in Art. 1 arose; but that her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims, the arbitrators should assume that her Majesty's Government had undertaken to act upon the principles set forth in these rules.' 'And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers, and to invite them to accede to them.'

The following award was made on September 14, 1872, by the Tribunal of Arbitration held at Geneva, viz.:—

'The Tribunal having since fully taken into their consideration the Treaty, and also the cases, counter-cases, documents, evidence, and arguments, and likewise all other communications made to them by the two parties during the progress of their sittings, and having impartially and carefully examined the same, has arrived at the decision embodied in

§ 14. At the commencement of the European war, in 1793,

the present award. Whereas, having regard to the 6th and 7th Articles of the said Treaty, the arbitrators are bound under the terms of the said 6th Article, "in deciding the matters submitted to them, to be governed by the three rules therein specified, and by such principles of International Law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case;" and whereas the "due diligence" referred to in the first and third of the said rules ought to be exercised by neutral Governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part; and whereas the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for exercise on the part of her Britannic Majesty's Government of all possible solicitude for the observance of the rights and duties involved in the Proclamation of Neutrality issued by her Majesty on the 13th day of May, 1861; and whereas the effects of a violation of Neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the Government of the belligerent Power, benefited by the violation of Neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offence is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence; and whereas the privilege of exterritoriality accorded to vessels of war has been admitted into the laws of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality; and whereas the absence of a previous notice cannot be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation; and whereas, in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character; and whereas, with respect to the vessel called the "Alabama," it clearly results from all the facts relative to the construction of the ship at first designated by the Number 290 in the port of Liverpool, and its equipment and armament in the vicinity of Terceira through the agency of the vessels called the "Agrippina" and the "Bahama," despatched from Great Britain to that end, that the British Government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said Number 290, to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable; and whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred; and whereas, in despite of the violations of the neutrality of Great Britain committed by the "290," this same vessel, later known as the Confederate cruiser "Alabama," was on several occasions freely admitted into the ports of Colonies of Great Britain, instead of being proceeded against, as it ought to have been, in any and every port within British jurisdiction in which it might have

the Government of the United States took strong grounds

been found; and whereas the Government of her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of the insufficiency of the legal means of action which it possessed: Four of the arbitrators for the reasons above assigned, and the fifth for reasons separately assigned by him, are of opinion—That Great Britain has in this case failed, by omission, to fulfil the duties prescribed in the first and third of the rules established by the 6th Article of the Treaty of Washington. And whereas, with respect to the vessel called the "Florida," it results from all the facts relative to the construction of the "Oreto" in the port of Liverpool, and to its issue therefrom, which facts failed to induce the authorities in Great Britain to resort to measures adequate to prevent the violation of the neutrality of that nation, notwithstanding the warnings and repeated representations of the agents of the United States, that her Majesty's Government has failed to use due diligence to fulfil the duties of neutrality; and whereas it likewise results from all the facts relative to the stay of the "Oreto" at Nassau, to her issue from that port, to her enlistment of men, to her supplies, and to her armament, with the co-operation of the British vessel "Prince Alfred," at Greeneay, that there was negligence on the part of the British Colonial authorities; and whereas, notwithstanding the violation of the neutrality of Great Britain committed by the "Oreto," this same vessel, later known as the Confederate cruiser "Florida," was, nevertheless, on several occasions, freely admitted into the ports of British Colonies; and whereas the judicial acquittal of the "Oreto" at Nassau cannot relieve Great Britain from the responsibility incurred by her under the principles of International Law; nor can the fact of the entry of the "Florida" into the Confederate port of Mobile, and of its stay there during four months, extinguish the responsibility previously to that time incurred by Great Britain: For these reasons:—The Tribunal, by a majority of four voices to one, is of opinion—That Great Britain has in this case failed, by omission, to fulfil the duties prescribed in the first, in the second, and in the third of the rules established by Article 6 of the Treaty of Washington.

'And whereas, with respect to the vessel called the "Shenandoah," it results from all the facts relative to the departure from London of the merchant vessel the "Sea King," and to the transformation of that ship into a Confederate cruiser, under the name of the "Shenandoah," near the Island of Madeira, that the Government of her Britannic Majesty is not chargeable with any failure, down to that date, in the use of due diligence to fulfil the duties of neutrality;

'But whereas it results from all the facts connected with the stay of the "Shenandoah" at Melbourne, and especially with the augmentation which the British Government itself admits to have been clandestinely effected of her force, by the enlistment of men within that port, that there was negligence on the part of the authorities at that place: For these reasons, the Tribunal is unanimously of opinion—That Great Britain has not failed, by any act or omission, to fulfil any of the duties prescribed by the three rules of Article 6 in the Treaty of Washington, or by the principles of International Law not inconsistent therewith, in respect to the vessel called the "Shenandoah," during the period of time anterior to her entry into the port of Melbourne;

'And, by a majority of three to two voices, the Tribunal decides that Great Britain has failed, by omission, to fulfil the duties prescribed by the second and third of the rules aforesaid, in the case of this same vessel, from and after her entry into Hobson's Bay, and is, therefore, responsible for all acts committed by that vessel after her departure from Melbourne, on the 18th day of February, 1865;

against the arming and equipping of vessels within their ports

'And so far as relates to the vessel called the "Tuscaloosa" (tender to the "Alabama"), the "Clarence," the "Tacony," and the "Archer" (tenders to the "Florida"), the Tribunal is unanimously of opinion that such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively. And so far as relates to the vessel called the "Retribution," the Tribunal, by a majority of three to two voices, is of opinion—That Great Britain has not failed by any act or omission to fulfil any of the duties prescribed by the three rules of Article 6 in the Treaty of Washington, or by the principles of International Law, not inconsistent therewith.

'And so far as relates to the vessels called the "Georgia," the "Sumter," the "Nashville," the "Tallahassee," and the "Chickamauga" respectively, the Tribunal is unanimously of opinion—That Great Britain has not failed, by any act or omission, to fulfil any of the duties prescribed by the three rules of Article 6 in the Treaty of Washington, or by the principles of International Law, not inconsistent therewith; and so far as relates to the vessels called the "Sallie," the "Jefferson Davis," the "Music," the "Boston," and the "V. H. Joy" respectively, the Tribunal is unanimously of opinion—That they ought to be excluded from consideration for want of evidence.

'And whereas, so far as relates to the particulars of the indemnity claimed by the United States, the costs of pursuit of the Confederate cruisers are not, in the judgment of the Tribunal, properly distinguishable from the general expenses of the war carried on by the United States: The Tribunal is, therefore, of opinion, by a majority of three to two voices—That there is no ground for awarding to the United States any sum by way of indemnity under this head.

'And whereas prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies, the Tribunal is unanimously of opinion—That there is no ground for awarding to the United States any sum by way of indemnity under this head.

'And whereas, in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses, and all claims for "gross freights," so far as they exceed "net freights"; and whereas it is just and reasonable to allow interest at a reasonable rate; and whereas, in accordance with the spirit and letter of the Treaty of Washington, it is preferable to adopt the form of adjudication of a sum in gross rather than to refer the subject of compensation for further discussion and deliberation to a Board of Assessors, as provided by Article 10 of the said Treaty: The Tribunal, making use of the authority conferred upon it by Article 7 of the said Treaty, by a majority of four voices to one, awards to the United States a sum of 15,500,000 dollars in gold as the indemnity to be paid by Great Britain to the United States for the satisfaction of all the claims referred to the consideration of the Tribunal, conformably to the provisions contained in Article 6 of the aforesaid Treaty.

'And, in accordance with the terms of Article 11 of the said Treaty, the Tribunal declares that "all the claims referred to in the Treaty, as submitted to the Tribunal, are hereby fully, perfectly, and finally settled."

'Furthermore, it declares that "each and every one of the said claims, whether the same may or may not have been presented to the notice of, or made, preferred, or laid before the Tribunal, shall henceforth be considered and treated as finally settled, barred, and inadmissible."'

by the respective belligerent powers, to cruise against each

Sir Alexander Cockburn, the arbitrator appointed by Great Britain, refused to sign the above award, and published his reasons for dissenting from it. After recapitulating the three rules of Art. 6, he proceeds to remark :—

'With these rules before it, the Tribunal is directed to determine, as to each vessel, whether Great Britain has, by any act or omission, failed to fulfil any of the duties set forth in such rules, or recognised by the principles of International Law not inconsistent with such rules.

'The effect of this part of the Treaty is to place this Tribunal in a position of some difficulty. Every obligation, for the non-fulfilment of which redress can be claimed, presupposes a prior existing law, by which a right has been created on the one side, and a corresponding obligation on the other. But here we have to deal with obligations assumed to have existed prior to the Treaty, yet arising out of a supposed law created for the first time by the Treaty. For we have the one party denying the prior existence of the rules to which it now consents to submit as the measure of its past obligations, while the other virtually admits the same thing, for it "agrees to observe the rules as between itself and Great Britain in future," and to bring them to the knowledge of other maritime Powers, and invite them to accede to them, all of which would plainly be superfluous and vain if these rules already formed part of the existing law recognised as obtaining among nations.

'It is, I cannot but think, to be regretted that the whole subject matter of this great contest, in respect of law as well as of fact, was not left open to us, to be decided according to the true principles and rules of International Law in force and binding among nations, and the duties and obligations arising out of them, at the time when these alleged causes of complaint are said to have arisen.

'From the history of the Treaty of Washington, we know that it was proposed by the British Commissioners to submit the entire question, both as to law and fact, to arbitration, but the Commissioners of the United States refused to "consent to submit the question of the liability of Great Britain to arbitration unless the principles which should govern the arbitrators in the consideration of the facts could be first agreed upon." In vain the British Commissioners replied that they "should be willing to consider what principles should be adopted for observance in future, but that they were of opinion that the best mode of conducting an arbitration was to submit the facts to the arbitrator, and leave him free to decide upon them after hearing such arguments as might be necessary!" The American Commissioners replied that they should be willing to consider what principles should be laid down for observance in similar cases in future, but only with the understanding that "any principles which should be agreed upon should be held to be applicable to the facts in respect to the 'Alabama' claims." The British Commissioners and Government gave way, possibly without fully appreciating the extent to which the principles, of which they were thus admitting the application, would be attempted to be carried in fixing them with liability. . . .

'If, however, the differences which have unhappily arisen between the United States and Great Britain were to be determined, not according to the rules of International Law, which the arbitrators to be agreed on should determine to be applicable to the case, but according to rules to be settled by the contending parties themselves, then I cannot but wish that the framers of this Treaty had been able to accomplish the difficult task, now left to us, of defining more precisely what is meant by the vague and uncertain term "due diligence," and had also set forth the

other, declaring such acts to be a violation of neutral rights,

further "principles of International Law, not inconsistent with the rules laid down," to which reference is made as possibly affecting the liability of Great Britain.

'To some of the heads of complaint herein-before referred to, this observation does not indeed apply. Whether vessels which might originally have been seized, should have been so dealt with when they re-entered British ports, or whether they were protected by the commissions they had in the meanwhile received from the Confederate Government; whether Confederate ships of war were permitted to make British ports the base of naval operations against the United States; whether the accommodation afforded to them in British ports constituted a violation of neutrality, for which Great Britain can be held liable, are questions which are left to be decided and must be decided according to the rules of International Law alone. But when we have to deal with the far more important question of the liability of Great Britain by reason of the omission to use "due diligence" to prevent the equipment of vessels of war in her ports, as required by the Treaty, we find nothing in the Treaty to direct us as to the meaning of that term, especially as regards the degree of diligence which is to be understood to be required by it.

'Left in this difficulty, we must endeavour to determine for ourselves the extent and meaning of the "due diligence" by which we are to test the alleged shortcomings of the Government of Great Britain. For it is plain that the standard of "due diligence" ought not to be left to the unguided discretion of each individual arbitrator. The municipal law of every country, wherever diligence is required by the law, whether in respect of obligations arising out of contract, or in regard to the due care which every one is bound to exercise to avoid doing harm to the persons or property of others, *ne alienum lædat*, prescribes some standard by which the necessary degree of diligence may be tested.

'Dealing here with a matter appertaining to law, it is to juridical science that we must look for a solution of the difficulty. And since we have to deal with a question of International Law, although, it is true, of an exceptional character, it seems to me that it will be highly useful to endeavour to form a clear view of the reciprocal rights and duties between belligerents and neutrals, created by International Law generally, and of the diligence necessary to satisfy the obligations which that law imposes. I cannot concur with Mr. Staempfli, that, because the practice of nations has at times undergone great changes, and the views of jurists on points of International Law have often been and still are conflicting, therefore there is no such thing as International Law, and that, consequently, we are to proceed independently of any such law—for such is the effect of his reasoning, if I understand it rightly—according to some intuitive perception of right and wrong, or speculative notions of what the rules as to the duties of neutrals ought to be. It seems to me that when we shall have ascertained the extent to which a neutral State is responsible, according to the general law of nations, for breaches of neutrality committed by its subjects, and the degree of diligence it would be called upon to exercise under that law, in order to avoid liability, we shall be better able to solve the question of what constitutes due diligence in the terms of the Treaty of Washington. That Treaty may have admitted a liability in respect of the equipment of ships, where none existed by International Law before, as I certainly think it has; but the degree of diligence required of a neutral Government to prevent breaches of neutrality by its subjects must be determined by the same principles, whatever may be the nature of the particular obligation. Besides the necessity of thus considering the relation of belligerents and neutrals

and positively unlawful; and that any vessel, so armed or

with reference to the subject of "due diligence," we have further, in order to satisfy the exigency of the articles of the treaty, to consider, whether, besides in the omission of "due diligence," Great Britain has failed to fulfil any duty imposed by any principle of International Law not inconsistent with the rules laid down. It is clear also, that, with reference to the other heads of complaint, our decision must necessarily depend entirely on the rules of International Law applicable thereto.'

Referring to the question of the Confederate vessels, he says:—'When the Government of the Confederate States had armed certain vessels, and had placed them under the command of officers duly commissioned by it, and those vessels put into ports of the neutral Powers, the Government of the United States protested loudly against their being received as vessels of war, on the ground that the Insurgent States still formed an integral portion of the Union; that they were to be looked upon as rebels; and that commissions from a Government, the independence of which had not been acknowledged, could not give to its ships the character of ships of war. They insisted, therefore, on these vessels being looked upon as pirates, to which all entry into the ports of other nations, and all assistance of every kind, should be denied. The Federal Government even went further, and threatened to hold neutral Governments responsible for any assistance or supplies afforded to Confederate ships. But the neutral Governments were unanimous in refusing to accede to these demands, and persisted in conceding to the Confederate ships the same privileges as were afforded to those of the United States.' And again, 'In January 1862, after the war had been going on for some months, circumstances arose which made further regulations as to the admission of the armed vessels of the two belligerents into British ports necessary. Instructions bearing date January 31, 1862, were accordingly issued by the Government. One of these had reference to the ports of the Bahamas in particular, the other to the ports and waters of her Majesty's dominions in general.'

On the question of coal he observes:—'The general regulations applicable to all her Majesty's ports, which, as we have seen, were in conformity with the wishes of the United States Government, though not intended by the British Government to have any operation more favourable to one belligerent than the other, nevertheless, could not fail to prove very prejudicial to the Confederates, the strict blockade of whose ports left their ships of war without any ports to which they could resort for repairs or supplies, or into which they could take their prizes. The rule forbidding them a greater supply of coal than would suffice to take them to their nearest port, and prohibiting also a renewal of the supply within three months, was obviously calculated to place them at the greatest possible disadvantage. Compelled, from having no ports of their own, to keep the sea, their means of doing so were necessarily lessened, and the regulation in itself, so unfavourable to the Confederate vessels, was rendered still more so by the strict construction put on it by her Majesty's Government, by whom the Governors of the different Colonies were instructed that, in case of any special application for leave to coal at a British port within the three months, if it appeared that any part of the former supply had been consumed otherwise than in gaining the nearest port, not even stress of weather should form a ground of exception. As no Confederate vessel could seek its nearest port, this was practically to prevent the possibility of a renewed supply under any circumstances within the three months.'

As to ships obtained from Great Britain he says:—'Next as to Great Britain having been, as it is said "the navy yard of the insurgents," it

equipped in the ports of the United States, for military service,

was, of course, impossible to prevent the Confederate Government, reduced to desperate straits by the blockade, and in want of ships of war, from resorting to the ship-builders' yards of Great Britain. It was impossible to prevent the ship-builders—who looked upon the furnishing of such vessels as purely commercial transactions, the Messrs. Laird, who built the "Alabama," having been perfectly willing, as appears from their correspondence with a Mr. Howard, who professed to have authority to enter into a contract with them to build vessels for the Federal Government, to supply ships to the latter as well as to the insurgents, and who appear to have thought that, so long as the ships were not armed in British waters, such transaction would not be within the Foreign Enlistment Act—from entering into such contracts. All the Government could do was to use reasonable care to see that the Act was not violated.'

'Two vessels of war, and two only, the "Florida" and the "Alabama," equipped in British waters, found their way into the hands of the Confederates. Whether, in respect of them, the British authorities were wanting in due diligence will be matter for future consideration, when these vessels come specifically under review. The most unjustifiable charge that the Government were wilfully wanting in the discharge of their duty from motives of partiality has, I hope, been already disposed of. Every other vessel built or equipped in British waters for the war service of the Confederate Government was prevented by the act of the British Government from coming into their hands. Immediate and untiring attention was paid to the frequent applications of Mr. Adams, which, for the most part, turned out to have proceeded on erroneous information. It may have been that, in the cases of the "Florida" and the "Alabama," the local officers may have been somewhat too much disposed to leave it to the United States officers to make out the case against the vessels. But such, as we have seen, had been the traditional view of the matter, not only in England, but in the United States. These officers may have attached too much importance to the fact that the vessels, though equipped for receiving arms, were not actually armed before leaving the port. In that they only shared the opinion of two distinguished judges in the Court of Exchequer. But when the authorities had become thoroughly alive to what was going on, no vessel of war to which the notice of the Government was called, and which proved to be intended for war, was suffered to escape. An enumeration of the instances on which inquiry was instituted by her Majesty's Government, with the results, will set this part of the case in its true light, and show the flagrant injustice of the wholesale accusations which have been so unwarrantably made.'

He thus concludes this exhaustive and lucid investigation on the laws of neutrality: 'I have now gone through the cases of all the different vessels in respect of which claims have been preferred for losses sustained through the alleged want of due diligence on the part of the British Government. After all that has been said and written, it is only in respect of two vessels, both equipped, at the very outset of the civil war, and before the contrivances resorted to had become known by experience, that this Tribunal, which has not shown a disposition to take too indulgent a view of the fulfilment of neutral obligations, has been able to find any default in British authorities at home, while in respect of a third, the Tribunal, by a majority of one voice only, has fixed the Government with liability for an alleged error in judgment of the Governor of a distant Colony in respect of allowance of coal, and for the want of vigilance of the police in not preventing men from joining a Confederate vessel at

Arming vessels and enlisting troops

was not entitled to the rights of asylum.[1] The authority of Wolfius, Vattel, and other writers on the law and usage of nations, was appealed to in support of these declarations and rules of neutrality. The ground then assumed by the United States is now generally admitted to be correct. The same objection was made by them in the war of 1793, against the enlisting of men by the respective belligerent powers within ports of the United States, and it was declared that if the neutral State might not, consistent with its neutrality, furnish men to either party for their aid in war, it was equally unlawful for either belligerent to enrol them in the neutral territory. Wolfius says that 'it is not permitted to raise soldiers on the territory of another, without the consent of its sovereign.' Vattel says that, 'As the right of levying soldiers belongs solely to the nation or the sovereign, no person must attempt to enlist soldiers in a foreign country, without the permission of the sovereign. . . . The man who undertakes to enlist soldiers in a foreign country, without the sovereign's permission, and, in general, whoever entices away the subjects of another State, violates one of the most sacred rights of the prince and the nation. This crime is distinguished by the name of kidnapping, or man-stealing, and is punished with the utmost severity in every well-regulated State. Foreign recruiters are hanged without mercy, and with great justice. It is not presumed that their sovereign has ordered them to commit a crime, and, even supposing that they had received such an order, they ought not to have obeyed it—their sovereign having no right to command

night. We have here the best practical answer to the sweeping charges so perseveringly brought against the British Government and people. . . .

'I concur entirely with the rest of the Tribunal, in holding that the claim for cost of pursuit and capture must be rejected. This item of expense formed part of the general expense of the war. The cruisers employed on this service would, probably, have been kept in commission had the three vessels in question never left the British shores.'

[1] It was decided by the Circuit Court of the Southern District of New York in 1818, that it is no breach of neutrality on the part of a belligerent to equip vessels of war in a neutral port, unless the act be interdicted. (Stoughton *v.* Taylor, 2 *Paine*, 655.)

It was decided under the 29 Geo. II., c. 16, s. 2, which prohibited the exportation of arms, &c., from Great Britain during time of war, except by license, when such arms were destined for Africa, that the act of a neutral ship meeting by agreement a British vessel, in Africa, for the purpose of receiving gunpowder and arms, was illegal, though the latter had a license to export them for the purpose of trade. (Gibson *v.* Mair, 1 *Marsh.*, 39; S.P., Gibson *v.* Leune, 1 *Stark.*, 119; S.C., 5 *Taunt.*, 433.)

what is contrary to the law of nature. . . . If it appear that they acted by order, such a proceeding in a foreign sovereign is justly considered as an injury, and as sufficient cause for declaring war against him, unless he make a suitable reparation.'[1]

Loans of money by neutrals

§ 15. The next question to be considered is, whether neutrals may assist a belligerent by money, in the shape of a loan or otherwise, without violating the duties or departing from the position of neutrality. It seems to be universally conceded, that if such loan be made for the manifest purpose of enabling the belligerent to carry on the war, it would be a virtual concurrence in the war, and consequently a just cause of complaint by the opposite party. But Vattel contends that the loaning of money to one belligerent, by the subjects of a neutral State, is not such a breach of neutrality as to be either a cause of war or of complaint, provided the loan is made for the purpose of getting good interest, and not for the purpose of enabling one belligerent to attack the other. Phillimore very properly regards this as a manifest frittering away of the important duties of the neutral; and that it is as much a violation of neutral duty to furnish the one as the other of the

'—— two main nerves, iron and gold,'

for the equipage and conduct of the war. The English courts have decided that such loans are in violation of international law, and that they will take no notice of, nor render any assistance in, any transactions growing out of such loans, unless raised with the special license of the crown.[2]

Pursuit of enemy from neutral ports

§ 16. Armed cruisers, in neutral ports, are not only bound not to violate the peace while within neutral jurisdiction, but they cannot use the asylum as a shelter from which to make

[1] Wolfius, *Jus Gentium*, § 754; Vattel, *Droit des Gens*, liv. iii. ch. ii. § 15.

[2] Phillimore, *On Int. Law*, vol. iii. § 151; De Wurtz *v.* Hendricks, 9 *Moore R.*, p. 586; Bello, *Derecho Internacional*, pt. ii. cap. vii. § 3. It is contrary to the law of nations for persons residing in Great Britain to enter into engagements to raise money, by way of loan, for the purpose of supporting subjects of a foreign State in arms against a Government in alliance with Great Britain. (De Wurtz *v.* Hendricks, 9 *Moore C.P.*, 586.)

British Courts of Justice will not take notice of, or afford any assistance to, persons who set about raising loans for subjects of a foreign Government, to enable them to prosecute war against that Government. At all events such loans cannot be raised without the license

an attack upon the enemy. Hence, if an armed vessel of one belligerent should depart from a neutral port, no armed

of the Crown. See also Josephs *v.* Pebrer, 1 *Car. and Pay. N. Pri. C.*, 341.

The two following opinions of the British law officers relate to the above question :—

'*To the Right Hon. George Canning, M.P., &c.*

'DOCTORS' COMMONS, *June* 17, 1823.

'SIR,—We have been honoured with your commands, signified in Mr. Planta's letter of the 12th inst., stating that you were desirous that we should report our opinion on the following questions :—

'1. Whether subscriptions for the use of one of two belligerent States by individual subjects of a nation professing and maintaining a strict neutrality between them be contrary to the law of nations, and constitute such an offence as the other belligerent would have a right to consider as an act of hostility on the part of the neutral Government?

'2. If such individual voluntary subscriptions in favour of one belligerent would give such just cause of offence to the other, whether loans for the same purpose would give the like cause of offence?

'3. And, if not, where is the line to be drawn between a loan at an easy or mere nominal rate of interest, or a loan with a previous understanding that interest would never be exacted, and a gratuitous voluntary subscription?

'In obedience to your commands, we beg leave to report that we have taken the same into our consideration, and we are of opinion that subscriptions of the nature above alluded to, for the use and avowedly for the support of one of two belligerent States against the other, entered into by individual subjects of a Government professing and maintaining neutrality, are inconsistent with that neutrality, and contrary to the law of nations; but we conceive that the other belligerent would not have a right to consider such subscriptions as constituting an act of hostility on the part of the Government, although they might afford just ground of complaint, if carried to any considerable extent. With respect to loans, if entered into merely with commercial views, we think, according to the opinions of writers on the law of nations and the practice which has prevailed, that they would not be an infringement of neutrality; but if, under colour of a loan, a gratuitous contribution was afforded without interest, or with mere nominal interest, we think such a transaction would fall within the opinion given in answer to the first question. We have the honour to be, &c., CHRISTOPHER ROBINSON (King's Advocate), R. GIFFORD (Attorney-General), J. S. COPLEY (Solicitor-General).'

'LINCOLN'S INN, *June* 21, 1823.

'SIR,—We have been honoured with your commands, signified to us by Mr. Planta in his letter dated the 18th inst., in which he states, with reference to the queries proposed to his Majesty's law officers in his letter of the 13th inst., he was directed by you further to ask for our opinion whether, having regard to the municipal law of this country, there exists any, and what, means of proceeding legally against individuals and corporations engaged in such subscriptions as were described in those queries.

'We have accordingly taken the same into consideration, and beg leave to report that, reasoning upon general principles, we should be inclined to say that such subscriptions in favour of one of two belligerent States being inconsistent with the neutrality declared by the Government

vessel, being within the same, and belonging to an adverse belligerent power, can depart until twenty-four hours after the former, without being deemed to have violated the law of nations. And if any attempt at pursuit be made, the neutral is justified in resorting to force, to compel respect to the sanctity of its neutrality.[1]

Passage over neutral waters

§ 17. If a belligerent cruiser, in acting offensively, passes over a portion of water within neutral jurisdiction, that fact is not usually considered such a violation of the territory as to invalidate an ulterior capture made beyond it. Permission to pass over territorial portions of the sea is not usually required or asked, because not supposed to result in any

of the country and with the law of nations, would be illegal, and subject the parties concerned in them to prosecution for a misdemeanour, on account of their obvious tendency to interrupt the friendship subsisting between this country and the other belligerent, and to involve the State in dispute, and possibly in the calamities of war. It is proper, however, to add that subscriptions of a similar nature have formerly been entered into (particularly the subscription in favour of the people of Poland in 1792 and 1793), without any notice having been taken of them by the public authorities of the country, and without any complaint having, as far as we can learn, been made by the Powers whose interests might be supposed to have been affected by such subscriptions. Neither can we find any instance of a prosecution having been instituted for an offence of this nature, or any hint at such a proceeding in any period of our history. We think, therefore, even if it could be proved that the money had been actually sent in pursuance of the subscription, it is not likely that a prosecution against the individuals concerned in such a measure would be successful.

'But, until the money be actually sent, the only mode of proceeding, as we conceive, would be for counselling or conspiring to assist with money one of the belligerents in the contest with the other, a prosecution attended with still greater difficulty.

'We beg leave further to report that no criminal proceeding can be instituted against a corporation for contributing its funds to such a subscription, but that the individual members who may be proved to have acted in the transaction can alone be made criminally responsible.

'We have the honour to be, &c., R. GIFFORD, J. S. COPLEY.'

[1] Kent, *Com. on Am. Law*, vol. i. p. 122; Azuni, *Droit Maritime*, tome ii. ch. v.; Ortolan, *Diplomatie de la Mer*, tome ii. ch. viii.; Hautefeuille, *Des Nations Neutres*, tit. vi. ch. i.; Pistoye et Duverdy, *Des Prises Maritimes*, tit. i. ch. i. sec. iii.; Marcy, *On Recruiting*, p. 50; Valin, *Com. sur l'Ordonnance*, t. ii. p. 274.

During the American Civil War the Confederate cruiser 'Nashville' being in the Southampton docks, the Federal ship of war 'Tuscarora' took up a position outside the harbour, thereby preventing the 'Nashville' from leaving. The 'Tuscarora' always kept up steam, and thus was able to precede the other ship whenever she attempted to leave. The 'Tuscarora' having left, the 'Nashville' could not leave for twenty-four hours; before the close of twenty-four hours the 'Tuscarora' would return to her anchorage. Repeating this operation, she effectually prevented the 'Nashville' from leaving.

inconvenience to the neutral power. Nor would the passage be deemed a violation of neutral rights, nor would a capture by either power be invalidated by the fact of such passage, *animo capiendi*, to the place where the right of capture could be exercised. 'Where a free passage,' says Sir William Scott, 'is generally enjoyed, notwithstanding a claim of territory may exist for certain purposes, no violation of territory is committed, if the party after an inoffensive passage, conducted in the usual manner, begins an act of hostility in open ground. In order to have an invalidating effect, it must at least be either an *unpermitted* passage over territory where permission is regularly requested, or a passage under permission obtained under false representation and suggestions of the purpose designed. In either of these cases there might be an original malfeasance and trespass that travelled throughout and contaminated the whole, but if nothing of this sort can be objected, I am of opinion that a capture, otherwise legal, is in no degree affected by a passage over territory in itself otherwise legal and permitted.'[1]

Municipal laws enforcing neutrality

§ 18. Such are the general prohibitions, recognised and established by the laws of nations, against any positive or even approximate acts of war in neutral territory. We are not aware that any modern writer on international law has questioned the soundness of the principle upon which they are founded. Moreover, the extent of a nation's sovereign rights depends, in some measure, upon its municipal laws, and other powers are bound, not only to abstain from violating such laws, but to respect the policy of them. The municipal laws of a State, for the protection of the integrity of its soil and the sanctity of its neutrality, are sometimes even more stringent than the general laws of war;[2] the right

[1] The 'Twee Gebroeders,' 3 *Rob.*, 354.

[2] The American Civil War, 1863, introduced a new series of cases in which the then Foreign Enlistment Act was called into operation; they were—the 'Oreto,' tried at Nassau, released August 1862; the 'Alexandra,' tried in England; the ironclads 'El Toussoon' and 'Mounassir;' the 'Tornado;' the cases of the 'Alabama,' 'Shenandoah,' and 'Georgia.' There were five prosecutions for enlisting men for the Confederate navy.

For representations addressed to the British Government by Mr. Adams during the last American Civil War, see Memorandum annexed to Lord Russell's letter to Mr. Adams, November 3, 1865. (*Parl. Pap. North Amer.*, No. 1, 1866, p. 139.)

The property in a prize of war may pass to the captors without such prize being taken into a port belonging to the country of the captors, or

of a sovereign State to impose such restrictions and prohibitions, consistent with the general policy of neutrality, as it

being condemned by a prize court. A prize of war (a merchantman), with a prize crew on board, is not a ship of war. A neutral steam-tug towing such a vessel—from neutral waters—to the waters of her captors, in the ordinary course of her employment, does not complete the capture, and is not employed in the naval service of a belligerent within the meaning of the Foreign Enlistment Act, 1870, s. 8, subs. 4. (The 'Gauntlet,' 1 *Aspin. Mar. Law Cas.*, 86. See also *ex parte* Ferguson and Hutchinson, *ibid.* 8; the 'Heinrich and Maria,' 4 *Rob.*, 43; the 'Polka,' 1 *Spinks*, 447. As to enlistment of men to serve abroad, see vol. i. ch. xviii. § 7.)

In 1870, during the Franco-German War, the British Government directed the seizure of a steamer about to leave England for the purpose of laying down a deep-sea telegraphic cable between certain ports of one of the belligerents. On application under the 23rd section of the Foreign Enlistment Act, 1870, by the owners of the ship and her cargo for the release of the same, it was held by the Court of Admiralty that *primâ facie* the transaction was a commercial one between subjects of Great Britain and of a Government in friendly relations with her; that it was not a case to consider whether the vessel might have been seized by a Prussian cruiser as being employed in the service of France, or as carrying contraband of war of a novel kind, but falling under the old principle; the carrier of contraband may violate the proclamation of the neutral State, of which he is a member, and deprive himself of the right to protection from her, but the punishment of his offence is, by the general law of nations, left to the belligerent who has the right of capture. The offence is not cognisable by the municipal law of Great Britain. The only bearing of the law of contraband on the case would arise from the analogies furnished by that law, namely, that as 'circumstances arising out of a particular situation of the war and condition of the parties engaged in it' (the 'Jonge Margaretha,' 1 *Rob.*, 193) might clothe an article *ancipitis usûs*, with the character of contraband, so it might be argued that the character of the 'International' might bring her within the category of a ship despatched for the naval service of France. The statute, by specifying 'military telegraphy,' had not excluded the possibility of showing that, in the particular circumstances of the case, postal telegraphy must be considered as the telegraphy employed in the military service of the State. The Company was formed to furnish ordinary postal telegraphs; the contract with the French Government was to furnish telegraphy of this kind only. No other kind was furnished. It was probable that this telegraphic line would be partially used for effecting communication between the French army and that Government, but neither did this appear to be the main object of the line, nor could it, without additions and adaptations, with which this Company had no concern, be made even partially to subserve this end. The probability that the line might be occasionally used for military, among other, purposes, was not sufficient to divest it of its primary and paramount commercial character, and to subject the Company to the very severe penalty imposed by the statute. There was a 'reasonable and probable cause' for the detention of the ship and cargo, and for putting the applicants on their defence. Release of the vessel decreed, but without costs or damages. (The 'International,' 3 *Mar. Law. Cas.*, 523.)

See also the 'Gauntlet,' *L. R.* 4. *P.C.*, 184.

It was held by the Queen's Bench Division, that the offence of fitting out and preparing an expedition within the Queen's Dominions, against a friendly State, under section 11 of the Foreign Enlistment Act, 1870, is sufficiently constituted by the purchase of guns and ammunition

may see fit, is undeniable. And all acts of the officers of a belligerent power against the municipal law of a neutral State, or in violation of its policy, involve that government in responsibility for their conduct.

Laws of the United States

§ 19. The Congress of the United States made suitable provision by statute for the support and due observance of the rules of strict neutrality within American territorial jurisdiction. By the law of April 20, 1818, it is declared to be a misdemeanour for any citizen of the United States, within the territory or jurisdiction thereof, to accept and exercise a commission to serve a foreign prince, State, colony, district, or people, in war, by land or by sea, against any prince, State, colony, district, or people with whom the United States are at peace, or to enlist, or enter himself, or hire or retain another person to enlist, or enter himself, or to go beyond the limits or jurisdiction of the United States, with intent to be enlisted or entered in the service of any

in England, and their shipment for the purpose of being put on board a ship in a foreign port, with a knowledge of the purchaser and the shipper that they are to be used in a hostile demonstration against such State, though the shipper takes no part in any overt act of war, and the ship is not fully equipped for the expedition within any port of the British dominions.

The facts were as follows :—In 1886 Colonel Sandoval, a foreigner, but residing in England, bought two Krupp guns at Sheffield, and a quantity of ammunition at Birmingham. The guns he sent to Woolwich to be fitted with carriages suitable for use at sea. The defendant then shipped in a general ship the guns and ammunition (20,000 rounds of ball cartridge and shells) to Antwerp, where there arrived at the same time a ship called the 'Justitia,' purchased by one Call in the name of his valet, Philips. He then embarked on board the 'Justitia,' and shortly afterwards she left Antwerp. He assumed the general command of those on board, among whom were three generals. The ship was supposed to be cleared for Trinidad, in the West Indies, and her papers were regular; she carried no cargo except a large quantity of bunker coal and the warlike stores. On the arrival of the ship off Grenada, it was discovered that she would not be allowed to put into Trinidad, because she was carrying arms on board. When off Trinidad the ship was transferred from Philips to General Pulgar, one of the officers on board, her name was altered, and the English flag hauled down and a foreign one run up in its place. The defendant, however, left the ship and landed at Trinidad. The ship then made for a place called Carupano, on the mainland of Venezuela, where a British consul was said to be, but one could not be found. She there took in tow a flotilla of boats, filled with armed men, and after harmlessly shelling a custom-house, engaged with a Venezuelan man-of-war, and was worsted, one of the generals on board being killed, and retired to San Domingo, whence the crew were sent back to England. The defendant was tried under sections 8 and 11 of the above Act (33 and 34 Vict., c. 90), but only found guilty under s. 11. (Reg. *v.* Sandoval, 56 *Law Times R.*, 526.)

foreign prince, State, &c.; or to fit out and arm, or to increase and augment, the force of any armed vessel, with the intent that such vessel be employed in the service of any foreign power at war with another power, with whom we are at peace; or to begin, set on foot, or provide or prepare the means for any military expedition or enterprise against the territory of any foreign prince or State, or of any colony, district, or people with whom we are at peace. And any vessel or vessels fitted out for such purpose are made subject to forfeiture. The President of the United States is also authorised to employ force to compel any foreign vessel to depart, which, by the law of nations, or by treaty, ought not to remain within the United States, and to employ the public force generally in enforcing the observance of the duties of neutrality prescribed by law.[1]

§ 20. The present British Foreign Enlistment Act (33 and 34 Vict., c. 90) was passed in 1870.[2] It repeals the older Act

Foreign Enlistment Act

[1] *U.S. Statutes at Large*, vol. i. p. 381; vol. iii. p. 447; Dunlop, *Laws of the United States*, pp. 580–583; the 'Gran Para,' 7 *Wheaton R.*, 489; the United States *v.* Quincy, 6 *Feters R.*, 445–467; the 'Alerta,' 9 *Cranch. R.*, 364; the 'Estrella,' 4 *Wheaton R.*, 309; Legare, *Opinions of U.S. Attys.-Genl.*, vol. iii. pp. 738, 741; Johnson, *ibid.* vol. v. p. 92.

In 1866 the United States considered the expediency of extending the provisions of the statute of 1818, but eventually did not do so. In that year a case was brought before the District Court at New York, in which this statute was enforced by that court against a vessel, alleged to be intended for the Chilian service in the war between Chili and Spain. This vessel, the 'Meteor,' had been built as a ship of war for sale to the United States Government, but the civil war having terminated, the sale was not effected. She was acknowledged to have been built to carry eleven or twelve guns, and the negotiations of the agent of the owners for her sale to the Chilian Government were shown by conclusive evidence. The vessel was libelled in the District Court in February 1866, but Judge Betts's decision in the case was not formally given until November. (See 1 *Am. Law Rev.*, 401.) In the elaborate judgment then delivered, the standard decisions of the Supreme Court are reviewed at length. Judgment was given against the vessel, but she was eventually restored to her owners under bond. The judgment was reversed by the Circuit Court, and an appeal from that Court to the Supreme Court of the United States was dismissed by consent.

[2] This Act decrees it to be a misdemeanour—

'4. If any person, without the license of her Majesty, being a British subject, within or without her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign State at war with any foreign State at peace with her Majesty, and in this Act referred to as a friendly State, or whether a British subject or not within her Majesty's dominions induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign State aforesaid.

'5. If any person, without the license of her Majesty, being a British

of 1819, and strengthens the hands of the executive. The earlier statutes of George II. which were enacted for the purpose of preventing the formation of Jacobite armies in

subject, quits or goes on board any ship with a view of quitting her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State, or whether a British subject or not, within her Majesty's dominions, induces any other person to quit or to go on board any ship with a view of quitting her Majesty's dominions with the like intent.

'6. If any person induces any other person to quit her Majesty's dominions, or to embark on any ship within her Majesty's dominions, under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State.

'7. If the master or owner of any ship, without the license of her Majesty, knowingly either takes on board, or engages to take on board, or has on board such ship within her Majesty's dominions any of the following persons: that is to say, any person who, being a British subject within or without the dominions of her Majesty, has, without the license of her Majesty, accepted or agreed to accept any commission or engagement in the military or naval service of any foreign State at war with any friendly State; any person, being a British subject, who, without the license of her Majesty, is about to quit her Majesty's dominions with intent to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State; any person who has been induced to embark under a misrepresentation or false representation of the service in which such person is to be engaged, with the intent or in order that such person may accept or agree to accept any commission or engagement in the military or naval service of any foreign State at war with a friendly State.

'8. If any person within her Majesty's dominions, without the license of her Majesty . . . builds or agrees to build, or causes to be built, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or issues or delivers any commission for any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or equips any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; or despatches, or causes or allows to be despatched, any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State; [except persons building or equipping ships in pursuance of contracts made before the commencement of war, under certain conditions.]

'9. [The proof shall lie on the builder that he did not know that the ship was to be employed for such foreign State.]

'10. If any person within the dominions of her Majesty, and without the license of her Majesty, [by adding to the number of guns, or by changing those on board for other guns, or by the addition of any equipment for war, increases the warlike force of any ship being within the dominion of her Majesty, but being in the service of any foreign State at war with any friendly State.]

'11. If any person within the limits of her Majesty's dominions, and

France and Spain, annexed capital punishment as for a felony to the offence of entering the service of a foreign State. There is no similar law in France; but all subjects exposing that country to reprisals are liable to punishment. Austria, Denmark, Spain, and Portugal prohibit the procuring of vessels of war, arms, or ammunition for the use of a foreign power; and Holland has prevented the equipment of vessels of war for such purpose.

Protection of property in neutral territory

§ 21. It is not only the right of the neutral State to protect the property of the belligerents when within the neutral jurisdiction, but it is a part of the duty of neutrality to defend such property while under neutral protection, and to punish any and every offence against the rights of neutrality, even, if necessary, by resort to force. Livy relates that Syphax enforced peace between the Carthaginian and Roman galleys while lying in a neutral port. The Venetians prevented the Greeks from attacking the Turks in the neutral port of Chalcocondylas. The same may be said of the Venetians and Turks at Tunis, of the Pisans and Genoese in Sicily, and numerous other cases mentioned in history. The Dutch East India fleet having put into Bergen, in Norway, in 1666, to avoid the English, were attacked by them; but the Government of Bergen fired on the assailants, and the court of Denmark complained to the English Government of the violation of its sovereignty. It is a well-established principle of the law of nations that if the property of belligerents, when within the neutral jurisdiction, be attacked, or any capture made, the neutral is bound to redress the injury and effect restitution. In the year 1793 the British ship 'Grange' was captured in Delaware Bay by a French frigate, and, upon due complaint, the American Government caused the British ship to be promptly restored. So, in the case of the 'Anna,' captured by a British cruiser in 1805, near the mouth of the Mississippi, and within the jurisdiction of the United States, the British Court of Admiralty not only restored the captured property, but fully asserted and vindicated the sanctity of neutral territory by a decree of costs and damages against the captor. If a neutral State neglects

without the license of her Majesty, prepares or fits out any naval or military expedition against the dominions of any friendly State . . . every person engaged . . . or employed in any capacity in such expedition shall be guilty of an offence against this Act.'

to make such restitution, and to enforce the sanctity of its territory, but tamely submits to the outrages of one of the belligerents, it forfeits the immunities of its neutral character with respect to the other, and may be treated by it as an enemy.[1]

Restitution of property captured in neutral territory

§ 22. Although it is the duty of a belligerent State to make restitution of the property captured within the territorial jurisdiction of a neutral State, yet it is a technical rule of the prize court to restore to the individual claimant, in such a case, only on the application of the neutral Government whose territory was violated in effecting the capture. This rule is founded upon the principle, that the neutral State alone has been injured by the capture, and that the hostile claimant has no right to appear, for the purpose of suggesting the invalidity of the capture. He must look to the neutral Government for redress of the violation of the right of asylum, and that Government is bound to effect a restitution, or procure indemnity for the injury suffered. This claim is usually preferred by the ambassador of the neutral State in the captor's country, to the prize court before which the captured property is brought for adjudication.[2]

If such property be in possession of neutral

§ 23. But if the property captured in violation of neutral rights comes into the possession of the neutral State, it is the right and duty of such State to restore it to its original owners. This restitution is generally made through the agency of the Courts of Admiralty and maritime jurisdiction. Traces of the exercise of such a jurisdiction are found in the history of English jurisprudence as early as the reigns of Charles II. and James II., and are now matters of ordinary occurrence in English and American Courts of Admiralty. Such restitution is not confined to captures within neutral jurisdiction, but

[1] Phillimore, *On Int. Law*, vol. iii. §§ 155–157; the 'Vrow Anna Catharina,' 5 *Rob.*, 15; the 'Anna,' 5 *Rob.*, 348; Heffter, *Droit International*, §§ 146–150; Bello, *Derecho Internacional*, pt. ii. cap. vii. § 6; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. xvii.

[2] The 'Etrusco,' 3 *Rob.*, 31, note; the 'Anne,' 3 *Wheaton R.*, 447; the 'Gen. Armstrong,' *Ex. Doc.*, No. 50, H. R., 32*nd Cong.*, 1st Sess.; No. 24, *Senate*, 2nd Sess.; *Revue Etr. et Fr.*, tome vii. p. 751.

No private person can interpose in a case of prize and make claim for the restoration of the captured property, on the ground that the capture was made within neutral waters. Whatever claim is made must be presented by the neutral nation, whose rights have been infringed. Even a consul, by virtue of his office merely, cannot interpose. (The 'Lilla,' 2 *Sprague*, 177.)

extends to all captures made in violation of neutral rights, such as by vessels which had been armed and equipped, or had received military munitions, or had enlisted men, or in any other way had violated the sanctity of neutral territorial jurisdiction.[1]

Decisions in the United States

§ 24. The power and duty of the United States to restore captures made in violation of their neutral rights and brought into American ports, have never been matters of question; but, in the constitutional arrangement of the different authorities of the American federal union, doubts were at first entertained, whether it belonged to the executive government, or to the judiciary, to perform the duty of inquiry into captures made in violation of American sovereignty, and of making restitution to the injured party. But it has long since been settled that this duty appropriately belongs to the federal tribunals, acting as courts of admiralty and maritime jurisdiction. It, however, has been judicially determined that this peculiar jurisdiction of the courts of the neutral government to inquire into the validity of captures made in violation of the neutral immunity, will be exercised only for the purpose of restoring the specific property, when voluntarily brought within the territory, and does not extend to the infliction of vindictive damages, as in ordinary cases of maritime injuries, and as is done by the courts of the captor's own country. The punishment to be imposed upon the party violating the municipal statutes of the neutral State, is a matter to be determined in a separate and distinct proceeding. The court will exercise jurisdiction, and decree restitution to the original owner, in case of capture from a belligerent power, by a citizen of the United States, under a commission from another belligerent power, such capture being a violation of neutral duty; but they have no jurisdiction on a libel for damages for the capture of a vessel as prize by the commissioned cruiser of a belligerent power, although the vessel may belong to citizens of the United States, and the capturing vessel and her commander be found and proceeded against within the jurisdiction of the court.[2]

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 12; *Life and Works of Sir L. Jenkins*, vol. ii. p. 727; Phillimore, *On Int. Law*, vol. iii. § 158; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. xvii.

[2] The United States *v.* Peters, 3 *Dallas R.*, 121–131; the 'Divina Pastora,' 4 *Wheaton R.*, 65, note; the 'Amistad de Rues,' 5 *Wheaton R.*,

Purchases in foreign ports

§ 25. In the case of capture by an armed vessel, fitted out in the ports of the United States, in violation of neutrality, the claim by an alleged *bonâ fide* purchaser in a foreign port was rejected, and restitution decreed to the original owners. It, however, was decided that a *bonâ fide* purchaser, without notice, in such a case is entitled to be reimbursed the freight which he may have paid upon the captured goods; and that an innocent neutral carrier of such goods, the same having been shipped in a foreign port, is entitled to freight out of the goods.[1]

If condemned in captor's country

§ 26. If such property, captured in violation of neutral immunity, be carried *infra præsidia* of the captor's country, and there regularly condemned in a competent court of prize, the question arises whether the courts of the neutral State will exercise jurisdiction, and restore such property to the original owners. If the property be found in the hands of the original wrong-doer, it will be restored by the court, notwithstanding a valid sentence of condemnation, properly authenticated. The offender's touch is said to restore the taint from which the condemnation may have purified the prize, and it is not for him to claim a right springing out of his own wrong.[2]

385; the 'Arrogante Barcelones,' 7 *Wheaton R.*, 519; 'La Nereyda,' 8 *Wheaton R.*, 108; Glass *v.* the 'Betsey,' 3 *Dallas R.*, 65 note *a*; McDonough *v.* the 'Mary Ford,' 3 *Dallas R.*, 188; Waite, *State Papers*, vol. vi. p. 195; the 'Estrella,' 4 *Wheat.*, 298.

[1] The 'Santissima Trinidad,' 7 *Wheaton R.*, 283; the 'Fanny,' 9 *Wheaton R.*, 658.

[2] The 'Arrogante Barcelones,' 7 *Wheaton R.*, 496; the 'Amistad de Rues,' 5 *Wheaton R.*, 390.

Neither an enemy, nor a neutral acting the part of an enemy, can demand restitution of captured property on the sole ground of capture in neutral waters. (The 'Sir William Peel,' 5 *Wall.*, 517.)

Captures by belligerent vessels, lawfully commissioned, are alone exempt from inquiry by neutral courts; and if the capturing vessel claims to be so exempted, the court should inquire and have proof of the exemption. (Talbot *v.* Jansen, 3 *Dall.*, 133.)

In the case of prize, where a neutral has a *jus in re*, namely, where he is in possession with a right of retention until a certain amount is paid to him, the captor takes *cum onere*, and should allow the amount of such right; but where the neutral has merely a *jus ad rem*, which he cannot enforce without the aid of a court of justice, his claim will not be recognised. (The 'Amy Warwick,' 2 *Sprague*, 150.)

Cases may occur in which a neutral ship may be authorised by the natural rights of self-preservation to defend herself from extreme violence threatened by a cruiser grossly abusing its commission; but in all ordinary cases it is her duty to submit to the captor, and rely on her remedy in costs and damages against it. (The 'Maria,' 1 *Rob.*, 374.)

A neutral ship, which had been rescued by her crew from the hands

In cases of illegal equipment and outfit

§ 27. Illegal equipment and outfit, in violation of neutral immunity, will not affect the validity of captures made after the cruise to which the outfit had been applied is actually terminated. The offence is deemed to be deposited at the termination of the voyage, and does not affect future transactions. This rule would result from analogy to other cases of violation of public law, and has been directly announced by the United States Supreme Court.[1]

Case of Arbuthnot and Ambrister

§ 28. In 1818, during the Seminole war, two Englishmen, Arbuthnot and Ambrister, were tried by court-martial by order of General Jackson, and executed. These gentlemen were resident among the Indians who inhabited the ill-defined borders of Georgia and Florida; they were taken by the Americans within the Spanish lines. Arbuthnot was charged with exciting and stirring up the Creek Indians against the United States, he being a subject of Great Britain, with whom the United States were at peace, and with aiding, abetting, and comforting the enemy, and supplying them with means of war. Ambrister was charged with aiding the enemy, and leading and commanding them. The court first sentenced him to

of a lawful cruiser, was condemned on the ground of such resistance. (The 'Dispatch,' 3 *Rob.*, 278)

A neutral cannot be permitted to aver compulsion and duress of one belligerent in justification of a departure from neutrality, to the prejudice of the other belligerent. If he sustain a loss from yielding to such duress, he must seek his remedy from the belligerent government imposing it. (The 'Carolina,' 4 *Rob.*, 260.)

A neutral ship captured on her return from a whaling voyage, and proceeded against under the Order in Council respecting fishing voyages from and to ports from which the British flag had been excluded, was decreed to be restored, the voyage having been commenced before the Order in Council was issued, and the ship having received no notice thereof. (The 'Johan,' *Edwards*, 275.)

A British subject cannot come before a Court of Prize to claim property taken in a course of trade forbidden by the laws of his country. Condemnation in such a case. (The 'Etrusca,' 4 *Rob.*, 462, n.)

[1] The 'Santissima Trinidad,' 6 *Wheaton R.*, 348. See also the following cases on neutral duties: the case of M. Genêt, *American State Papers*, vol. i.; the Terceira affair, Hansard's *Parl. Debates*, N.S., vol. xxiii. p. 737; 'La Amistad de Rues,' 5 *Wheat.*, 385; the 'Alabama,' the 'Florida,' the 'Shenandoah,' the 'Nashville,' the 'Sumter,' the 'Georgia,' the 'Tuscaloosa,' *Papers relating to the Treaty of Washington*, vols. i. to iv., published at Washington, 1872–1873; the 'Tuscarora,' Bernard's *British Neutrality during the American Civil War*, p. 267; the dispute between Denmark and Sweden, *Annual Register*, mdcclxxxviii., 292 and 293; Swedish frigates sold to Mexico, De Martens, *Causes Célèbres*, vol. v. p. 229; Gideon Henfield, Wharton's *State Trials*, p. 49; United States *v.* Quincy, 6 *Peters*, 445; Attorney-General *v.* Sillem and others, 2 *Hurl.* and *Colt. R.*, 431; the 'Gauntlet,' *L. R.*, 4. *P. C.*, 184.

death, but on reconsideration ordered him to be whipped, and confined with a chain for twelve months. General Jackson, of his own authority, revived the former decision, and caused the unhappy man to be shot. The committee of the House of Representatives condemned the conduct of General Jackson, and declared that they could find no law of the United States authorising a trial before a military court for such offences as those alleged against the two prisoners (except so much of the second charge against Mr. Arbuthnot which contained an allegation that he had acted as a spy, but of which he was found, Not guilty). In the opinion of the committee no usage authorised or exigency appeared, from the report of the trial, which could justify the assumption and exercise of power, by the court-martial and commanding general, but they were of opinion that the prisoners were entitled to claim from the American Government that protection, which the most savage of their foes had uniformly experienced when disarmed and in their power; that humanity shuddered at the idea of a cold-blooded execution of prisoners, disarmed and in the power of the conqueror; that the principle assumed by General Jackson, that the prisoners by uniting in war against the United States while at peace with Great Britain had become outlaws and pirates, and liable to suffer death, was not recognised in any code of international law. Considerable correspondence ensued on the subject between the British and American Governments. The matter was subsequently debated in the House of Lords, on the motion of the Marquis Lansdowne for proceeding further with the question, which doubtless was one of great delicacy. It was evident that the act of cruelty and violence of General Jackson, not only was not done by the order of the American Government, but that it was without any knowledge or participation whatever of that Government. The act which had been committed formed a charge on the part of the American Government against their general. The only question for the British Government was, if the case was one which called for retribution, and whether they should interfere for the protection of British subjects who engage, without the consent of their Government, in the service of States at war with each other, but at peace with their Government. Any British subject who engages in such foreign service, without permission, forfeits the protection of his country, and becomes

liable to military punishment, if the party by whom he is taken chooses to carry the rights of war to that cruel severity. This is a principle admitted by the law of nations, and which, in the policy of the law of nations, has been frequently adopted. It is obvious that if it were to be maintained, that a country should hold out protection to every adventurer who enters into foreign service, the assertion of such a principle would lead it into interminable warfare. The case of Ambrister stands on the ground that he was taken aiding the enemy, and although General Jackson's conduct was most atrocious in inflicting upon him a capital punishment, and contrary to the sentence of the court-martial, that was a question between the general and his Government Arbuthnot's case stands on a different ground. He was not taken in arms, but he was proved—as a political servant rather than as a military agent—to have afforded equal aid and assistance to the enemy, and could not be held to be exempt from punishment; he had placed himself in the same position as if he bore arms. And it was on these considerations that the above-mentioned motion was negatived.[1]

The following Proclamation of Neutrality was made by Great Britain in 1877:—

'VICTORIA *R.*

British proclamation of neutrality, 1877

'WHEREAS We are happily at Peace with all Sovereigns, Powers, and States:

'And whereas, notwithstanding Our utmost Exertions to preserve Peace between all Sovereign Powers and States, a State of War unhappily exists between his Majesty the Emperor of all the *Russias* and his Majesty the Emperor of the *Ottomans*, and between their respective Subjects and others inhabiting within their Countries, Territories, or Dominions:

'And whereas We are on Terms of Friendship and amicable Intercourse with each of these Sovereigns, and with their several Subjects and others inhabiting within their Countries, Territories, or Dominions:

'And whereas great Numbers of Our loyal Subjects reside and carry on Commerce, and possess Property and Establishments, and enjoy

[1] In the *Brit. and For. St. Pap.* for 1818-1819 (vol. vi.), p. 326, will be found the correspondence with Great Britain relative to this war, in which the proceedings against Arbuthnot and Ambrister are reviewed. The extracts include (*inter alia*) the instructions of Mr. Adams, Secretary of State, to Mr. Irving, November 18, 28, and December 2, 1818, General Jackson's letter to the Governor of Pensacola, together with full notes of the trial of Arbuthnot and Ambrister, letters from Arbuthnot, and subsequent correspondence, and with General Jackson and General Gaines.

various Rights and Privileges, within the Dominions of each of the aforesaid Sovereigns, protected by the Faith of Treaties between Us and each of the aforesaid Sovereigns:

'And whereas We, being desirous of preserving to Our Subjects the Blessings of Peace which they now happily enjoy, are firmly purposed and determined to maintain a strict and impartial Neutrality in the said State of War unhappily existing between the aforesaid Sovereigns:

'We, therefore, have thought fit, by and with the advice of Our Privy Council, to issue this Our Royal Proclamation:

'And We do hereby strictly charge and command all Our loving Subjects to govern themselves accordingly, and to observe a strict Neutrality in and during the aforesaid War, and to abstain from violating or contravening either the Laws and Statutes of the Realm in this Behalf, or the Law of Nations in relation thereto, as they will answer to the contrary at their Peril:

'And whereas in and by a certain Statute made and passed in a Session of Parliament holden in the 33rd and 34th Year of Our Reign, intituled "An Act to regulate the Conduct of her Majesty's Subjects during the Existence of Hostilities between Foreign States with which her Majesty is at Peace," it is, amongst other things, declared and enacted as follows:—[Quoting sections 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the Foreign Enlistment Act.]

'And whereas by the said Act it is further provided that Ships built, commissioned, equipped, or despatched in contravention of the said Act, may be condemned and forfeited by Judgment of the Court of Admiralty; and that if the Secretary of State or Chief Executive Authority is satisfied that there is a reasonable and probable cause for believing that a Ship within Our Dominions has been or is being built, commissioned, or equipped, contrary to the said Act, and is about to be taken beyond the Limits of such Dominions, or that a Ship is about to be despatched contrary to the Act, such Secretary of State, or Chief Executive Authority, shall have Power to issue a Warrant authorising the Seizure and Search of such Ship and her Detention until she has been either condemned or released by process of Law: And whereas certain Powers of Seizure and Detention are conferred by the said Act on certain Local Authorities:

'Now, in order that none of Our Subjects may unwarily render themselves liable to the Penalties imposed by the said Statute, We do hereby strictly command, that no Person or Persons whatsoever do commit any Act, Matter, or Thing whatsoever contrary to the Provisions of the said Statute, upon Pain of the several Penalties by the said Statute imposed, and of Our high displeasure.

'And We do hereby further warn and admonish all Our loving Subjects, and all Persons whatsoever entitled to Our Protection, to observe towards each of the aforesaid Sovereigns, their Subjects and Territories, and towards all Belligerents whatsoever with whom We are at Peace, the Duties of Neutrality; and to respect, in all and each of them, the Exercise of those Belligerent Rights which We and Our Royal Predecessors have always claimed to exercise.

'And We hereby further warn all Our loving Subjects, and all Persons whatsoever entitled to Our Protection, that if any of them shall presume, in contempt of this Our Royal Proclamation, and of Our high Displeasure, to do any Acts in derogation of their Duty as Subjects of a Neutral Sovereign in a War between other Sovereigns, or in violation or contravention of the Law of Nations in that Behalf, as more especially by breaking, or endeavouring to break, any Blockade lawfully and actually established by or on behalf of either of the said Sovereigns, or by carrying Officers, Soldiers, Despatches, Arms

Ammunition, Military Stores or Materials, or any Article or Articles considered and deemed to be Contraband of War according to the Law or Modern Usages of Nations, for the Use or Service of either of the said Sovereigns, that all Persons so offending, together with their Ships and Goods, will rightfully incur and be justly liable to hostile Capture, and to the Penalties denounced by the Law of Nations in that Behalf.

'And We do hereby give Notice that all Our Subjects and Persons entitled to Our Protection who may misconduct themselves in the Premises will do so at their Peril, and of their own Wrong; and that they will in nowise obtain any Protection from Us against such Capture, or such Penalties as aforesaid, but will, on the contrary, incur Our high Displeasure by such Misconduct.

'Given at Our Court at *Windsor*, this Thirtieth Day of *April*, in the year of Our Lord One thousand eight hundred and seventy-seven, in the Fortieth Year of Our Reign.

'GOD SAVE THE QUEEN.'

On the same date the following letter was addressed by the Earl of Derby to the Treasury, the Home Office, the Colonial Office, the War Office, the Admiralty, and the India Office:—

'*Foreign Office:*
April 30, 1877.

'HER Majesty being fully determined to observe the duties of neutrality during the existing state of war between the Emperor of all the Russias and the Emperor of the Ottomans, and being moreover resolved to prevent, as far as possible, the use of her Majesty's harbours, ports, and coasts, and the waters within her Majesty's territorial jurisdiction, in aid of the warlike purposes of either belligerent, has commanded me to communicate to you, for your guidance, the following rules, which are to be treated and enforced as her Majesty's orders and directions:—

'Her Majesty is pleased further to command that these rules shall be put in force in the United Kingdom, the Isle of Man, and the Channel Islands, on and after the 5th of May instant, and in her Majesty's territories and possessions beyond the seas, six days after the day when the Governor, or other chief authority of each of such territories or possessions respectively, shall have notified and published the same; stating in such notification that the said rules are to be obeyed by all persons within the same territories and possessions.

'1. During the continuance of the present state of war, all ships of war of either belligerent are prohibited from making use of any port or roadstead in the United Kingdom, the Isle of Man, or the Channel Islands, or in any of her Majesty's Colonies or foreign possessions or dependencies, or of any waters subject to the territorial jurisdiction of the British Crown, as a station, or place of resort, for any warlike purpose, or for the purpose of obtaining any facilities of warlike equipment; and no ship of war of either belligerent shall hereafter be permitted to sail out of or leave any port, roadstead, or waters subject to British jurisdiction, from which any vessel of the other belligerent (whether the same shall be a ship of war or a merchant ship) shall have previously departed, until after the expiration of, at least, twenty-four hours from the departure of such last-mentioned vessel beyond the territorial jurisdiction of her Majesty.

'2. If any ship of war of either belligerent shall, after the time when this Order shall be first notified and put in force in the United Kingdom, the Isle of Man, and the Channel Islands, and in the several

Colonies and foreign possessions and dependencies of her Majesty respectively, enter any port,[1] roadstead, or waters belonging to her Majesty, either in the United Kingdom, the Isle of Man, or the Channel Islands, or in any of her Majesty's Colonies or foreign possessions or dependencies, such vessel shall be required to depart and to put to sea within twenty-four hours after her entrance into such port, roadstead, or waters, except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew, or repairs; in either of which cases the authorities of the port, or of the nearest port (as the case may be), shall require her to put to sea as soon as possible after the expiration of such period of twenty-four hours, without permitting her to take in supplies beyond what may be necessary for her immediate use; and no such vessel which may have been allowed to remain within British waters for the purpose of repair shall continue in any such port, roadstead, or waters, for a longer period than twenty-four hours after her necessary repairs shall have been completed. Provided, nevertheless, that in all cases in which there shall be any vessel (whether ships of war or merchant ships) of the said belligerent parties in the same port, roadstead, or waters within the territorial jurisdiction of her Majesty, there shall be an interval of not less than twenty-four hours between the departure therefrom of any such vessel (whether a ship of war or merchant ship) of the one belligerent, and the subsequent departure therefrom of any ship of war of the other belligerent;[2] and the time hereby limited for the departure of such ships of war respectively shall always, in case of necessity, be extended so far as may be requisite for giving effect to this proviso, but no further or otherwise.

'3. No ship of war of either belligerent shall hereafter be permitted, while in any port, roadstead, or waters subject to the territorial jurisdiction of her Majesty, to take in any supplies, except provisions and such other things as may be requisite for the subsistence of her crew, and except so much coal only as may be sufficient to carry such vessel to the nearest port of her own country,[3] or to some nearer destination, and no coal shall again be supplied to any such ship of war in the same or any other port, roadstead, or waters subject to the territorial jurisdiction of her Majesty, without special permission, until after the expiration of three months from the time when such coal may have been last supplied to her within British waters as aforesaid.

'4. Armed ships of either party are interdicted from carrying prizes [4]

[1] It is evident that if there are prisoners of war on board the ship, they would not become free by the fact of the ship being in neutral waters. If they landed, it is submitted that they would become free.

[2] On the termination of the civil war in the United States in 1865 vessels of war under the Confederate flag were refused permission to enter British waters, or if already there were ordered to leave at once; the benefit of the twenty-four hours rule being nevertheless maintained in their favour. Any such vessel, however, which divested herself of her warlike character and the Confederate flag, and disarmed, was allowed to remain in British waters at her own risk, and without any protection save such as she might be entitled to in time of peace; and the twenty-four hours rule was not applicable to her.

[3] There appears to be no prohibition against such coals and other provisions (in case of the usual means failing) being supplied from British or foreign ships of war, if the commanders of such vessels permit the same to be done.

[4] This is, of course, with the exception of the pressure of some necessity, such as stress of weather. The letter does not appear to authorise the *detention* of prizes if brought into port, but their entry being interdicted they should, except

made by them into the ports, harbours, roadsteads, or waters of the United Kingdom, the Isle of Man, the Channel Islands, or any of her Majesty's Colonies or possessions abroad.

'I have, &c., (Signed) DERBY.'

under the above exception, be immediately ordered to quit, and, if necessary, compelled to do so by force. In the case of doubt arising whether a vessel brought into British waters be really a prize or not, the British authorities should require the production of the vessel's papers, and if this enquiry should prove the vessel to be an uncondemned prize brought into British waters in violation of H. M.'s orders, the prohibition of the exercise of any further control over her by the captors, and the retention of the vessel by the British authorities until reclaimed by her original owners, appears to be the proper course, although not warranted by this letter. But it should be remembered that if a prize has been actually and *bonâ fide* converted into, and used as, a public vessel of war, it will cease to be a 'prize' within the meaning of this letter. If the prize has been captured by any violation of British territorial waters, the prize should not be suffered to depart, but should be detained. All cargo on board a prize should be treated as part of the prize, unless such cargo had been previously disposed of to neutrals, and by them brought within British jurisdiction.

CHAPTER XXV

LAW OF SIEGES AND BLOCKADES

1. Interdiction of intercourse with places besieged or blockaded—2. Authority to institute sieges and blockades—3. Distinction between them—4. Actual presence of an adequate blockading force—5. Temporary absence produced by accident—6. Constructive or paper blockades—7. Use of steam—8. Course of England and France in the wars of Napoleon—9. *De facto* blockades—10. Public blockades—11. If blockading vessels be driven away by superior force—12. If removed for other duty—13. If blockade be irregularly maintained—14. A maritime blockade does not affect interior communications—15. Effect of a siege upon communications by sea—16. Breach of blockade a criminal act—17. Public notification charges parties with knowledge—18. What constitutes a public notification—19. Effect of general notoriety—20. Cases which preclude a denial of knowledge—21. When presumption of knowledge may be rebutted—22. Proof of actual knowledge or warning—23. An attempt to enter—24. Inception of voyage—25. Exception in case of distant voyages—26. In case of *de facto* blockades—27. Where presumption of intention cannot be repelled—28. Neutral vessel entering in ballast—29. Declarations of master—30. Delay in obeying warning—31. Disregard of warning—32. When ingress is excused—33. Violation of blockade by egress—34. When egress is allowed—35. Penalty of breach of blockade—36. When cargo is excepted from condemnation—37. Duration of offence—38. Insurance, how affected by violation of a blockade—39. Hautefeuille's theory of the law of blockades.

No intercourse with a place besieged or blockaded

§ 1. THE same law which confers upon belligerents the right to capture and destroy each other's property imposes upon neutrals[1] the obligation not to interfere with the proper exercise of this right. Although, as a general rule, neutrals may continue their accustomed trade and intercourse with either or both of the parties to a war, there are, as already

[1] According to the Courts of the United States, to create the right of blockade and other belligerent rights, as against neutrals, it is not necessary that the party claiming them should be at war with a separate and independent power. The parties to a civil war are in the same predicament as two nations who engage in a contest and have recourse to arms. See Prize Cases determined in the Supreme Court of the United States, 1862; 2 *Black*, 635. (The 'Brilliante' *v.* United States, 1 *Am. Law Rep.*, N.S., 334.)

remarked, certain exceptions to this rule, established by the positive law of nations, one of which is, that the neutral shall not communicate or carry on trade with a place or post which is besieged or blockaded. Grotius considers the carrying of supplies to a besieged town or a blockaded port, as an offence exceedingly aggravated and injurious; Bynkershoek thinks the prohibition is founded on natural reason as well as established usage; both agree that a neutral so offending may be severely dealt with; Vattel says that he may be treated as a public enemy. The views of these distinguished founders of international law are fully concurred in by the opinions of modern publicists, and by the prize courts of all countries. The right of a belligerent to invest the places and ports of an enemy so as to entirely exclude the commerce (otherwise lawful) of neutrals, during the continuance of the investment, to prevent exports as well as imports, and to cut off all communication of commerce with the blockaded place, is undoubted, and, however serious the grievance, it is one to which neutral governments and their subjects are bound to submit. But as this right of the belligerent is an exception to the general rights of neutrals, and bears with great severity upon their interests, its exercise is always watched with peculiar jealousy, in order to prevent its necessary evils from being aggravated by a lax construction of the laws which regulate its application.[1]

Authority to institute sieges and blockades

§ 2. The institution of a siege, or blockade, is a high act of sovereignty,[2] and must proceed, either directly from the government of the State or from some officer to whom the authority has been expressly or impliedly delegated. The general of an army, or the commander of a fleet, in a foreign country, or on a distant station, may be reasonably presumed to carry with him this authority, as the exigencies of the service on which he is employed, under the varying circumstances of the war, would often seem to require its exercise. His authority in such cases is, therefore, implied from the nature

[1] Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. i. § 5; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. xi.; Vattel, *Droit des Gens*, liv. iii. ch. vii. § 117; the 'Juffrow Maria Schroeder,' 3 *Rob.*, 147; the 'Haabet,' 6 *Rob.*, 58; the 'Franciska,' 10 *Moore P. C.*, 36.

[2] The President of the United States, in time of war, has the power, by virtue of the constitutional authority conferred upon him as commander-in-chief of the army and navy, to institute and declare a blockade (The 'Tropic Wind,' 14 *Law Rep.*, N.S., 144.)

of the service. But where the station of the army or fleet is so near the government of the belligerent State as to enable the commander to receive direct and special instructions, it would seem that the necessity of presuming power in the officer does not exist, and it has been suggested by some, that it is the duty of the commander, in such a case, if his authority should be questioned, to justify his acts by express proof of the instructions of his government. The weight of authority, however, is in favour of the rule that a neutral individual is never at liberty to impeach the regularity of a siege or blockade, otherwise valid, by questioning the authority of the officer by whom it was established or is enforced. The officer is undoubtedly answerable to his own government for any irregular or unauthorised acts, but so long as they are acts of legitimate hostility, it is not open to a neutral State or its subjects, under any circumstance, to dispute their validity. The orders of his government are known only to that government and the officer, and cannot be enquired into by third parties. If he has acted without orders, and his acts are subsequently adopted and ratified, such ratification supplies the want of an original authority, and precludes all further enquiry. But if the act is disavowed by the government of the belligerent State, or if it can be proved that the officer exceeded his actual authority, such disavowal or excess may be urged as a valid defence. Where a blockade has been declared by the government, the commander of the blockading squadron has no discretionary power to extend its limits; and if he prohibits neutral ships from entering ports not embraced in the terms of the blockade he was appointed to enforce, the warning is illegal, and no penalty is incurred by the neutral master by whom it is disregarded.[1]

Distinction between them

§ 3. A *siege* is a military investment of a place, so as to intercept, or render dangerous, all communications between the occupants and persons outside of the besieging army; and the place is said to be *blockaded*, when such communication, *by water*, is either entirely cut off or rendered dangerous

[1] The 'Henrick and Maria,' 1 *Rob.*, 146; the 'Rolla,' 6 *Rob.*, 366; Duer, *On Insurance*, vol. i. p. 646; Phillimore, *On Int. Law*, vol. iii. § 288; the 'Juffrow Maria Schroeder,' 3 *Rob.*, 154; Cameron *v.* Kyte, 3 *Knapp. R.*, 342; Chitty, *Law of Nations*, p. 259; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. xviii.; Bello, *Derecho Internacional*, pt. ii. cap. viii. § 5.

by the presence of the blockading squadron. A place may be both besieged and blockaded at the same time, or its communications by water may be intercepted, while those by land may be left open, and *vice versâ*. Both are instituted by the rights of war, and for the purpose of injuring the enemy, and both impose upon neutrals the duty of not interfering with the operations of the belligerents. But there is an important distinction, with respect to neutral commerce, between a maritime blockade and a military siege. The object of a blockade is solely to distress the enemy, intercepting his commerce with neutral States. It does not, generally, look to the surrender or reduction of the blockaded port, nor does it necessarily imply the commission of hostilities against the inhabitants of the place. The object of a military siege is, on the other hand, to reduce the place by capitulation, or otherwise, into the possession of the besiegers. It is by the direct application of force, that this object is sought to be attained, and it is only by forcible resistance that it can be defeated. Hence, every besieged place is, for the time, a military post; for even when it is not defended by a military garrison, its inhabitants are converted into soldiers by the necessities of self-defence. This distinction is not merely nominal, but, as will be shown hereafter, leads to important consequences in determining the rights of neutral commerce, and in deciding questions of capture.[1]

[1] The 'Stert,' 4 *Rob.*, 66; Kluber, *Droit des Gens Moderne*, § 297; Heffter, *Droit International*, § 154. General Le Blois, in his work *Fortifications in Presence of the New Artillery* (1865), strongly recommends the shocking idea that hollow projectiles be thrown upon all points of the interior of a fortified place. 'Shell the dwelling-houses,' says he; 'when the shells fall in the various quarters, the catastrophes are in proportion to the density of the population. Death hovers above the heads of all. Each individual feels threatened as to his own existence and that of all he holds dear in the world, while at any moment his property may be destroyed by fire. . . . The governor is made responsible for all the disasters that occur; the people rise against him, and his own troops seek to compel him to an immediate capitulation.'

The French military law (Art. 218) 'condemns to capital punishment every commandant who gives up his place without having forced the besiegers to pass by the slow and successive stages of a siege, and before having repulsed at least one assault on the body of the place by practicable breaches.' General Ulrich, although in defending Strasbourg he had made such a defence as no other general had made throughout the Franco-German war of 1870, could not obey this article. He could not repel or even await an assault, for it was a physical impossibility for his men to remain on the ramparts in presence of the hurricane of fire kept up by the Prussians. Nor did any other French general observe this

Actual presence of an adequate blockading force

§ 4. It is now a well-settled principle of international jurisprudence, that a lawful maritime blockade of a port requires the actual presence of a competent blockading force. A mere proclamation or notification of one belligerent, that such a port of the other belligerent will be blockaded at such a time, and thus closed to neutral commerce, is not sufficient to constitute a legal blockade; the force must be actually present at the entrance to the port, or sufficiently near to prevent communication. Nor is the mere presence of a hostile force sufficient, of itself, to make the blockade a legal one; it must not only be actually present, but it must be large enough to prevent communication, or, at least, to render it dangerous to attempt to enter the port.[1]

Temporary absence produced by accident

§ 5. The only exception to the general rule which requires the *actual presence* of an *adequate* force to constitute a legal blockade is the temporary absence of the blockading squadron, produced by accident, as in the case of a storm. Such accidental removal of the blockading force, if it be only for a very short time, does not suspend the legal operation of the blockade, and an attempt to take advantage of such an accidental removal is regarded as a fraudulent attempt to break the blockade. But if the blockading forces should be so scattered or injured by the storm, as to be unable to resume their stations without repairs, and within a reasonable time, the blockade will be considered as terminated, in the same manner as if the blockading squadron had been driven away by a superior force of the enemy. Some ports are subject to such periodical storms during one or more months of the year, that any blockading squadron is obliged to leave its station, and seek refuge in some other harbour till the season of storms is passed. In such cases the legal operation of the blockade is suspended. It should be remembered, however, that some text-writers do not admit this exception

article. A telegraphic communication ran through the trenches at Strasbourg; and also between the batteries at Kehl and a church tower close by, whence an artillery officer watched each shot and corrected or approved the gunner's aim. (Edwards's *Germans in France.*)

[1] Kent, *Com. on Am. Law*, vol. i. p. 144; Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 28; Phillimore, *On Int. Law*, vol. iii. § 289; the 'Betsey,' 1 *Rob.*, 92; the 'Mercurius,' 1 *Rob.*, 82, 83; the 'Vrouw Judith,' 1 *Rob.*, 150; Ortolan, *Diplomatie de la Mer*, tome ii. ch. ix.; Hautefeuille, *Des Nations Neutres*, tit. ix. ch. i.; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 11.

of the temporary and accidental absence of the blockading force. They say that the blockade is not mere theory, but the material result of a material fact (*résultat matériel d'un fait matériel*), and, consequently, cannot exist in the absence of that fact; that, therefore, the blockade must be regarded as raised the moment the blockading force is removed, no matter whether the absence is for a long or short period, or whether produced by accident, by storm, or by an opposing force.[1]

Constructive or paper blockades

§ 6. A *constructive*, or, as it is sometimes called, a *paper blockade*, is one established by proclamation, without the actual presence of an adequate force to prevent the entrance of neutral vessels into the port or ports so pretended to be blockaded. It is now universally conceded to be illegal. The ancient text-writers all agree that a blockade which does not really exist, but is merely declared by proclamation, is not sufficient to render commercial intercourse unlawful on the part of neutrals. Grotius forbade the carrying of anything to 'a town actually invested, or a port closely blockaded;' and Bynkershoek evidently concurred with Grotius, in requiring a strict and actual siege or blockade, such as where a town is actually invested with troops or a port closely blockaded by ships of war (*oppidum obsessum, portus clausos*). This is shown from his remarks upon the various decrees of the States-General. The general practice of the Continental powers accorded with the opinions of these writers. In the convention of 1801, between Great Britain and Russia, intended as a final adjustment of the disputed points of maritime law which had given rise to the armed neutrality of 1780 and 1801, the general law of nations as to what constitutes a blockade is very correctly expressed. The third article, section fourth, of that convention, declares: 'That in order to determine what characterises a blockaded port, that denomination is given only where there is, by the disposition of the power which attacks it with ships stationary or

[1] The 'Columbia,' 1 *Rob.*, 154; the 'Triheten,' 6 *Rob.*, 65; the 'Hoffnung,' 6 *Rob.*, 116; the 'Frederick Molke,' 1 *Rob.*, 73; the 'Juffrow Maria Schroeder,' 3 *Rob.*, 155; Radcliff *v.* U. Ins. Co., 7 *Johns.*, 38; Laing *v.* U. Ins. Co., 2 *Johns.*, 178; Hautefeuille, vol. iii. p. 119; the 'Nancy,' 1 *Act.*, 37. 'Blockading ships are at liberty to take a prize if it comes in the way, but they are not to chase to a distance, for that would be a desertion of their duty of blockade. ('La Mélanie,' 2 *Dodson*, 130.)

sufficiently near, *an evident danger in entering*.' The same definition of a blockade is implied in the previous treaties between Great Britain and the Baltic powers, and in that of 1794 with the United States. In 1804 instructions were sent by the Board of Admiralty to the naval commanders and judges of the Vice-Admiralty Courts, not to consider any blockade of the French West India islands as existing unless in respect to particular ports which were *actually invested*.[1]

Use of steam

§ 7. Although the above definition of blockade remains unaltered, the application of it to practice has been much altered by the introduction of steam power. A port must be strictly blockaded; but for the purposes of blockade two or three steam vessels may be as effective now as twenty sailing vessels were formerly. Also under particular circumstances a single vessel may be adequate to maintain the blockade of one port, and co-operate with other vessels, at the same time, in the blockade of another neighbouring port. On the other hand a blockade is not to be extended by construction. The mouth of the Rio Grande was not included in the blockade of the ports of the Southern States, set on foot by the Federal Government, during the American Civil War of 1862; and neutral commerce with Matamoras, a neutral town on the Mexican side of the river, except in contraband destined to the enemy, was entirely free. *Semble*, a belligerent cannot blockade the mouth of a river occupied on one bank by neutrals with complete rights of navigation.[2]

In the wars of Napoleon

§ 8. In the course pursued by the belligerents in the wars of the French revolution and empire, and in the British Orders in Council, and Napoleon's retaliatory decrees, an attempt was made by England and France to annul the well-established rule of blockades, and to close the ports and coasts of a whole State to neutral commerce, by simple proclamations, and without the slightest pretence of an actual blockading force. The United States constantly protested

[1] The 'Betsey,' 1 *Rob.*, 92; the 'Mercurius,' 1 *Rob.*, 84; Reddie, *Researches, Historical*, &c., vol. ii. p. 16; Pistoye et Duverdy, *Traité des Prises*, tit. vi. ch. ii. § 2; Heffter, *Droit International*, § 157; De Cussy, *Droit Maritime*, liv. i. ch. vii.; Wheaton, *Hist. Law of Nations*, pp. 138–143; Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 28; Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. i. § 5; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. xi.; Hautefeuille, *Des Nations Neutres*, tit. ix. ch. v. § 1; the 'Henrick and Maria,' 1 *Rob.*, 146.

[2] The 'Nancy,' 1 *Act.*, 69; the 'Peterhoff,' 5 *Wall.*, 28.

against this proceeding. At the commencement of the Crimean War in 1854 England and France declared their intention to 'maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an *adequate force* against the enemy's ports, harbours, or coasts.' This declaration was a virtual condemnation of paper blockades, although it was in form a mere temporary order. But the declaration of the plenipotentiaries of France, Great Britain, Russia, Austria, Prussia, Sardinia and Turkey, on April 16, 1856, at the Conference of Paris, removed all doubt on this point, by announcing in the fourth Article or principle, that 'blockades, in order to be binding, must be effective; that is to say, *maintained by a force sufficient really to prevent access to the coast of the enemy.*' This proposition was approved by the United States, and has been adopted by the other nations of Europe. There is, therefore, very little danger of its ever again being disputed as an established principle of international jurisprudence. This Article, however, fails to define what is a 'sufficient force;' and it is difficult to lay down a precise definition of it. 'In the eye of the law,' said Sir A. Cockburn in Geipel *v.* Smith, a blockade is effective if the enemies' ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through?'[1] A blockade is not necessarily made by ships; it may equally well be made by land batteries commanding the sea.[2]

De facto blockades

§ 9. Blockades are divided, by English and American publicists, into two kinds—(1) a simple or *de facto* blockade, and (2) a public or governmental blockade. This is by no means a mere nominal distinction, but one that leads to practical consequences of much importance. In cases of capture, the rules of evidence which are applicable to one kind of blockade, are entirely inapplicable to the other; and what a neutral vessel might lawfully do in case of a simple blockade, would be sufficient cause for condemnation in case

[1] *L. R.*, 7 *Q. B.*, 410.

[2] The 'Circassian,' 2 *Wall.*, 149; the 'Baigorry,' *ibid.* 480; the 'Andromeda,' *ibid.* 481; Phillimore, *On Int. Law*, vol. iii. Appendix, pp. 850, 851; Ortolan, *Diplomatie de la Mer*, tome ii., appendice spécial; Pistoye et Duverdy, *Traité des Prises*, tit. vi. ch. v. § 2; Heffter, *Droit International*, § 157; De Cussy, *Précis Historique*, ch. xii.

of a governmental blockade. A simple or *de facto* blockade is constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from facts, it ceases when they terminate; its existence must, therefore, in all cases, be established by clear and decisive evidence. The burthen of proof is thrown upon the captors, and they are bound to show that there was an actual blockade at the time of the capture. If the blockading ships were absent from their stations at the time the alleged breach occurred, the captors must prove that it was accidental, and not such an absence as would dissolve the blockade.[1]

Public blockades

§ 10. A *public*, or governmental blockade, is one where the investment is not only actually established, but where also a public notification of the fact is made to neutral powers by the government, or officers of State, declaring the blockade. Such notice to a neutral State is presumed to extend to all its subjects; and a blockade established by public edict is presumed to continue till a public notification of its expiration. Hence the burthen of proof is changed, and the captured party is now bound to repel the legal presumptions against him by unequivocal evidence. It would, probably, not be sufficient for the neutral claimant to prove that the blockading squadron was absent, and there was no actual investment at the time the alleged breach took place; he must also prove that it was not an accidental and temporary absence, occasioned by storms, but that it arose from causes which, by their necessary and legal operation, raised the blockade.[2]

[1] The English Government informed the Haytian Government in 1889 that their blockade of insurgent ports of Hayti could no longer be respected by Great Britain, because the blockade had ceased to be effective.

[2] The 'Neptunus,' *K.*, 1 *Rob.*, 170; the 'Christina Margaretha,' 6 *Rob.*, 62; the 'Vrouw Johanna,' 2 *Rob.*, 109; Duer, *On Insurance*, vol. i. pp. 649, 650; the 'Mercurius,' 1 *Rob.*, 82; the 'Neptunus,' *H.*, 2 *Rob.*, 110; the 'Welvaart van Pillaw,' 2 *Rob.*, 130; Ortolan, *Diplomatie de la Mer*, tome ii. ch. ix.

In 1804 Napoleon issued directions, framed by himself, for the improvement of his fleet in Brest water. He began by complaining that the enemy should be permitted, with so few ships, to blockade so large a fleet as the one in the port. He ordered the ships to get under weigh every day, as well to exercise the crews as to harass the British, and favour the passage of the flotilla coming from Audierne; that 200 soldiers should be placed on board each ship of the line, who, besides being exercised at the guns and about the rigging and sails, were to row in the ship's launch. Premiums were to be given to those who excelled in these

If driven away by force

§ 11. Where the blockading squadron is driven away from its station by a superior force of the enemy, the interruption operates as a legal discontinuance of the blockade, and on its renewal the same measures are necessary to bring it to the knowledge of neutrals, either by public declaration or by the notoriety of the fact, as were legally requisite when it was first established. It is, in effect, a new blockade, and not the continuance of the old one. The reason of this is obvious. The raising of the blockade by a superior force of the enemy effects a material change in the relative circumstances of the war, and a new course of events arises which may lead the government to make a very different disposition of its blockading force. It, therefore, introduces a new and different train of presumptions, in favour of the ordinary freedom of commercial intercourse.

If removed for other duty

§ 12. A blockade is dissolved by the removal of the blockading force for a different service, although the removal should be a temporary one. Even where only a portion of the force is ordered away, the legal effect is the same, unless the force that is left is competent, by itself, to maintain and enforce the blockade, by its ability to prevent all communications. But the blockade is not considered as raised where some of the passes of communications are left unguarded and open by the temporary absence of some of the ships in chasing suspicious vessels which had approached the blockaded port; for the service in which such ships are employed is a necessary part of the duty they are appointed to perform, and their absence is justly regarded as accidental, like that produced by stress of weather; they, however, are bound to resume their station with due diligence, as otherwise their prolonged absence would lead to the inference that they had been detached as cruisers, and the blockade would be considered as suspended.[1]

matters; and nothing that could excite the emulation of either soldiers or sailors appears to have been overlooked. Every ship of the line was to be provided with a quantity of 36-pound shells for her lower battery, and the men were to be taught how to fire them off with effect. The captains were ordered not to quit their vessels to go on shore, and even the commander-in-chief was not allowed to lodge elsewhere than on board his ship. (James, *Nav. Hist.*, vol. iii. p. 216.)

[1] The 'Triheten,' 6 *Rob.*, 65; the 'Hoffnung,' 6 *Rob.*, 112; Williams *v.* Smith, 2 *N. Y. R.*, p. 1; the 'Eagle,' 1 *Act. R.*, 68; the 'Rolla,' 6 *Rob.*, 372; the 'Fox,' 1 *Edw. R.*, 321.

Every vessel of a blockading squadron is bound to do all in its power

If blockade be irregularly maintained

§ 13. A blockade is also dissolved by repeated instances of an improper relaxation of the application of the blockading force to the purposes intended. The mere presence of an adequate force is not sufficient to constitute and maintain a blockade, but its application must be constant and uniform, to prevent all communication with the port it encloses. If, through motives of civility, or other considerations, it should allow ships, not privileged by law, to enter or depart, the irregularity may be justly held to vitiate the blockade, as it necessarily tends to deceive other parties. Where some are suffered to pass, others will have a right to infer that the blockade is raised. To justify this presumption, however, there must be repeated instances of an improper relaxation, for one or two cases would hardly be deemed sufficient to warrant the belief that the legal restraint on neutral commerce had been wholly removed.[1]

Effect of maritime blockades on interior communications

§ 14. A legal blockade can only exist where its actual force can be applied; hence the legal effect of a maritime blockade, not accompanied by a military investment on land, applies only to a direct communication by sea, and to vessels sailing from, or immediately destined to, the blockaded port, and cannot be construed to prohibit the conveyance of articles, not contraband of war, to or from the blockaded port, by interior communications. A blockade can never be a complete investment of a place unless its force can be applied to every point by which a communication may be carried on. It is true that, by this construction, a maritime blockade is usually imperfect, as a complete investment, but this imperfection arises from the nature of the force applied; it is now universally conceded that the extent of legal pretensions of a blockade is unavoidably limited by the physical impossibility of applying ships to obstruct communications by land. The conveyance of goods through the mouth of a river under

in the service to be performed, and the law presumes that that obligation is fulfilled unless the contrary be proved. The rule is different with respect to joint associations, or enterprises undertaken by privateers or cruisers owned by individuals. (The 'Anglia,' *Blatchf. Pr. Cas.*, 566.)

[1] Duer, *On Insurance*, vol. i. p. 654; Jacobsen, *Seerecht*, p. 683.

The proclamation of the President of May 12, 1862, not only relaxed the blockade so far as to let in vessels duly licensed, but entirely raised the blockade of the ports therein named, as respected neutrals. The proviso respecting the license was construed to be a regulation of trade with places in the military possession of the Government. (The 'Alma,' 15 *Law Rep.*, N.S., 663.)

blockade, for the purpose of being shipped for exportation, is regarded as a breach of blockade, it being perfectly insignificant whether this is effected in large or small vessels. Thus, goods shipped in a river, having been previously sent in lighters along the coast from the blockaded port, with the ship under charter party proceeding also from the blockaded port in ballast to take them on board, were held liable to confiscation.[1]

Effect of a siege upon communications by sea

§ 15. It might be inferred, by parity of reasoning, that, when a port is under a military siege, neutral commerce might still be lawfully carried on by sea, through channels of communication which could not be obstructed by the forces of the besieging army. But such inference would not be strictly correct, for the difference between a blockade and a siege, in their character and object, have led to a difference in the rules applicable, in the two cases, to neutral commerce. Although the legal effect of a siege on land, that is, a purely military investment of a naval or commercial port, may not be an entire prohibition of neutral commerce, yet it does not leave the ordinary communications by sea open and unrestricted, as a purely maritime blockade leaves the interior communications by land. The primary object of a blockade is, as we have already said, to prohibit commerce; but the primary object of a siege is the reduction of the place. All writers on international law impose upon neutrals the duty of not interfering with this object. To supply the inhabitants of the place besieged with anything required for immediate use, such as provisions and clothing, might be giving them aid to prolong their resistance. It is, therefore, a clear departure from neutral duty to furnish supplies, even of possible utility, to a port in a state of siege, although the communication by sea may be open. It would be a direct interference in the war, tending to the relief of one belligerent, and to the prejudice of the other; and such supplies are justly deemed contraband of war, to the same extent as if destined to the immediate use of the army or navy of the enemy. Hence, although the prohibition of neutral commerce with a

[1] The 'Jonge Pieter,' 4 *Rob.*, 83; the 'Ocean,' 3 *Rob.*, 297; the 'Maria,' 6 *Rob.*, 201; the 'Charlotte Sophia,' 6 *Rob.*, 204, note; Heffter, *Droit International*, § 155. A proclamation by a commander, without an actual investment, will not constitute a legal blockade. (The 'Betsey,' 1 *Rob.*, 93.)

port besieged be not entire, yet it will extend to all supplies of even possible utility in prolonging the siege.[1]

Breach of blockade a criminal act

§ 16. The breach of a blockade is viewed, in all cases, as a criminal act; this necessarily implies a criminal intent, and to constitute such intent a knowledge of the existence of the blockade, and an intention to violate it, are indispensable. These are sometimes a presumption of law which the party is not permitted to repel, in others, an inference more or less probable, but in many cases they must be shown by positive evidence. Sometimes one will be presumed, while the other will require positive proof. Although both knowledge and intention must be combined to complete a criminal intent, it is evident that the questions themselves are perfectly distinct, and, in any particular case, may be governed by different rules of evidence. The judicial decisions in England and in the United States have given great precision to the rules of law applicable to a breach of blockade, by the clearness of their reasoning and the equity of their illustrations. They are distinguished, likewise, for general coincidence and harmony in their principles.[2]

[1] Duer, *On Insurance*, vol. i. pp. 656-658; Vattel, *Droit des Gens*, liv. iii. ch. vii. § 117.

The permission of the English king, granted to the city of Bremen, for lighters to navigate between the rivers Jade and Weser with innocent cargoes, notwithstanding the blockade, was held to justify the particular trade in which the ship was engaged. Restitution of ship and cargo was decreed, on payment of captor's expenses. (The 'Maria,' 6 *Rob.*, 201; the 'Charlotte Sophia,' *ibid.* 204, n.; the 'Lisette,' *ibid.* 394.)

A vessel destined for a neutral port, with no ulterior destination for the ship, or none by sea for the cargo, to any blockaded place, violates no blockade. Hence trade, during the Civil War in the United States, between London and Matamoras, two neutral places, the latter an inland port of Mexico and close to the Federal boundary of Mexico, even with intent to supply, from Matamoras, goods to Texas, then an enemy of the Federal States, was not unlawful on the ground of such violation.

[2] For cases of a vessel condemned as enemy's property and for attempt to violate a blockade, see the 'Advocate,' *Blatchf., Pr. Cas.*, 142. For a vessel *and cargo* condemned for the same cause, see the 'Shark,' *Blatchf., Pr. Cas.*, 215; the 'General C. C. Pinckney,' *ibid.* 278; the 'Zavalla,' *ibid.* 173. For a cargo condemned for attempt to violate blockade, and as enemy's property, see the 'Edward Barnard,' *Blatchf., Pr. Cas.*, 122. For a cargo condemned for attempt to violate blockade, and as contraband of war, see the 'Richard O'Bryan,' 2 *Sprague*, 197. For a vessel and cargo condemned for an actual or attempted violation of blockade, see the 'Solidad Cos,' *Blatchf., Pr. Cas.*, 94; the 'Albion,' *ibid.* 95; the 'Express,' *ibid.* 128.

A vessel ostensibly bound to Port Royal, then in the possession of the United States forces, was condemned for an attempt to break the blockade of other ports. (The 'Ocean Bird,' 2 *Sprague*, 261.)

Public notification charges parties with knowledge

§ 17. It has been held by the English Courts of Admiralty, that the notification of a blockade to a neutral government is, by construction of law, a direct personal notice to each inhabitant of that country, and that he cannot be allowed to aver his own ignorance of the blockade, or otherwise contradict the legal presumption of knowledge. To allow individuals to plead ignorance of a blockade which had been notified to their government would wholly defeat the object of the notification. It is true that the exclusion of this evidence may operate with severity in particular cases; but an opposite construction would render a notification, in the words of Sir William Scott, 'the most nugatory thing in the world.' If the neutral government should fail to communicate the information to its subjects, by a prompt and authoritative publication of the notice which it receives, those subjects who suffer from such neglect cannot complain of the belligerent State, but must address their complaints, and demand for compensation, to their own government.[1]

What constitutes a public notification

§ 18. A question may here arise as to what constitutes a public notification. This is usually in the form of an official communication from the belligerent to the authorities of neutral States. It may be a notice that a certain port will be blockaded on and after a certain date, or that it is the intention of the belligerent to proceed to blockade certain ports or harbours. Such notices require a *subsequent* notice of the commencement or time of the actual blockade. Sometimes several notifications are given, such as a notice of intention, a subsequent notice of the sailing of the naval forces for the purpose of carrying that intention into execution, and finally a notice

[1] Kent, *Com. on Am. Law*, vol. vi. pp. 147, 148; Phillimore, *On Int. Law*, vol. viii. § 290; Duer, *On Insurance*, vol. i. p. 659; the 'Jonge Petronella,' 2 *Rob.*, 131; the 'Spes and Irene,' 5 *Rob.*, 79; the 'Welvaart,' 2 *Rob.*, 128.

Under the proclamation of blockade by the United States, April 19, 1861, it was not necessary for the lawful capture of a vessel seized for violating the blockade, that a warning should have been previously endorsed on her register, when at the time of capture she possessed knowledge of the blockade. (The 'Hiawatha,' *Blatchf., P. C.*, 1.)

Although a notification of blockade does not, *proprio vigore*, bind any country but that to which it is addressed, yet in a reasonable time it must affect neighbouring States with knowledge as a reasonable ground of evidence. A vessel seized for breach of blockade by egress was condemned, the court holding the master to have been cognisant of the blockade, although his government had received no notification thereof, and he and his crew swore to ignorance of the fact. (The 'Adelaide,' 1 *Rob.*, 111.)

of the actual commencement of the blockade. The two former are given, as a matter of courtesy, for the information of neutrals. The French have held that a general *diplomatic* notice is not sufficient to charge parties with a knowledge of a blockade, but there must be an actual notice by the blockading force. This doctrine was distinctly announced by Count Molé, in his letter of October 20, 1838, to the French Minister of Marine, in relation to the French blockade of Vera Cruz, Mexico, and is strenuously advocated by Ortolan and other French writers on international law. As already remarked, British writers and British Courts of Admiralty regard a public or diplomatic notice of a blockade as, by construction of law, a direct, personal notice to each inhabitant of the State so notified.

Effect of general notoriety

§ 19. Instead of a direct official notification to a neutral government of the establishment of, or intention to institute, a blockade of a particular port, a general notice to that effect is sometimes given by official publication in the newspapers. By this means information is distributed among the mercantile community more generally and expeditiously than through the ordinary channels of official communication with the neutral government. Thus, where the vessel intercepted is destined to a blockaded port, and there is clear and positive proof that the existence of the blockade was generally known at her port of departure when she sailed, neither the master nor his owners, nor the shippers of the goods, will be permitted to aver their personal ignorance of that which it is scarcely possible they should not have known, or, at any rate, by due enquiry might have ascertained. To allow proof of personal ignorance in such a case, by admitting the affidavits of the master or his crew, would be a direct invitation to perjury and fraud.[1]

Cases which preclude a denial of knowledge

§ 20. Where a neutral vessel is intercepted on her passage, with a cargo *from* a blockaded port, and the cargo is proved to have been shipped after the blockade had commenced, and was known at the port, the party is precluded from denying his knowledge of its existence. The personal ignorance of the master, in such a case, could only have arisen from a

[1] The 'Adelaide,' 2 *Rob.*, 111; the 'Frederick Molke,' 1 *Rob.*, 86; the 'Hare,' 1 *Act. Ap. Ca.*, 261. A notice of blockade to the officials of a neutral government is sufficient notice to the subjects of such government. (The 'Hiawatha,' *Blatchf., P. C.*, 2.)

fraudulent determination not to know—an obstinate exclusion of knowledge it was his duty to have acquired ; and if his personal ignorance could be proved, it would not form even an equitable defence. He is, therefore, very justly precluded from denying his knowledge of what is morally impossible he should have been ignorant of, except for a fraudulent intent.[1]

When presumption of knowledge may be rebutted

§ 21. There are many cases where the inference of a knowledge of the blockade is so probable as to create a strong presumption, but a presumption not entirely conclusive, and which may be repelled by unimpeached and positive proof. Thus a public notification to one neutral State will be presumed, in due time, to reach the inhabitants of a neighbouring power not officially notified of the blockade, as such information, generally circulated in one country, must of necessity in time reach the knowledge of the inhabitants of an adjoining country. But as such notification does not, *proprio vigore*, bind the inhabitants of any State but that to which it is addressed, the presumption of such knowledge, in a reasonable time, may be repelled by positive evidence. So, where a blockade has lasted for such a considerable time as to render it highly probable that its existence must have been known at the port of departure, a knowledge of it will be presumed, and it will rest upon the party to show by satisfactory proof that he was not apprised of the blockade. Again, where the neutral vessel is intercepted on her egress from a blockaded port, with a cargo shipped immediately after the blockade had commenced, and while it might have been unknown to the inhabitants of the port when the vessel sailed, the party will be allowed to rebut the presumption of law by satisfactory proof of his ignorance of the establishment of the blockade. In all cases of this kind, where the presumption of knowledge is not absolute and conclusive, the neutral claimant is allowed to prove his own innocence. And the captor can judge from the nature and circumstances of each particular case, whether the neutral vessel is acting in good faith, and is really ignorant of the existence of the blockade, or whether the pretended ignorance is a mere fraudulent attempt to deceive.[2]

[1] The 'Frederick Molke,' 1 *Rob.*, 86; the 'Vrouw Judith,' 1 *Rob.*, 150. A blockade may be broken by obstinacy as well as by fraud of the master. (The 'Henrick and Maria,' 1 *Rob.*, 147.)

[2] See the report of eight cases, in the High Court of Admiralty,

Proof of actual knowledge or warning

§ 22. Where there are no legal or probable grounds for imputing to the master of a neutral vessel the knowledge of the existence of a blockade which he is charged to have violated, it rests upon the captor to establish the fact of this knowledge by positive evidence. To warrant a condemnation, the proof must be clear and definite that such vessel had been duly notified of the blockade, and had undertaken or prosecuted the voyage in defiance of the notice or warning. To be binding, the notice or warning must be clear, and not so ambiguous or insidious as to be calculated to mislead the neutral master, otherwise it is illegal and void. Where it is expressed in such general terms as to embrace other ports not blockaded, it is not even valid as to the blockaded port, although included in the general language. Where the notice is irregular and insufficient, no penalty is incurred by its contravention. Proof of the actual knowledge of the party at the inception of the voyage supersedes, in all cases, the necessity of a warning, nor is it of any importance by what means or in what form he received the information, if the information was credible in its nature, and came in such a form and from such a source as to leave no reasonable doubt on his mind as to its authenticity; he is not permitted to aver that he placed no confidence in a communication that had just claims to his belief. Again, if the voyage was commenced without a knowledge of the blockade, but he was afterwards notified of its existence by a cruiser, or officer of the blockading State, and he continue his voyage with the evident intention of entering the blockaded port, he is liable to condemnation.[1]

on the blockade of the coast of Courland, 1854, by Dr. J. Parker Deane, D.C.L.; also the 'Calypso,' 2 *Rob.*, 298; the 'Hurtige Hane,' 3 *Rob.*, 328; Pistoye et Duverdy, *Traité des Prises*, tit. vi. ch. ii. § 2; the 'Mercurius,' 1 *Rob.*, 80; the 'Betsey,' *ibid.* 93.

[1] Kent, *Com. on Am. Law*, vol. i. pp. 147, 148; Duer, *On Insurance*, vol. i. p. 663; the 'Henrick and Maria,' 1 *Rob.*, 146; the 'Vrouw Judith,' 1 *Rob.*, 150; the Apollo,' 5 *Rob.*, 286; the 'Columbia,' 1 *Rob.*, 156; Phillimore, *On Int. Law*, vol. iii. § 302; Heffter, *Droit International*, § 155.

A vessel sailing ignorantly to a blockaded port is not liable to capture. (Yeaton *v.* Fry, 5 *Cranch.*, 335.)

The prize courts look with disfavour on the excuse that the purpose of a vessel, in attempting to enter a blockaded port, was to obtain necessary supplies. (The 'Argonaut,' *Blatchf., Pr. Cas.*, 62.)

Upon a question of breach of blockade, the owners of a vessel are deemed in a prize court conclusively bound in all cases by the act of the master, and so, as a general rule, are persons interested in the cargo. (The 'Aries,' 2 *Sprague*, 198.) But this is qualified by the case of the 'Springbok,' 5 *Wall.*, 1.

§ 23. An actual entrance into a blockaded port is by no means necessary to render a neutral ship guilty of a violation of the blockade. Indeed, such a construction would essentially defeat the very object of a blockade, by rendering the capture of a ship lawful only after such capture had ceased to be possible. Hence it is universally held that an *attempt* to enter the port, knowing it to be blockaded, completes the offence to which the penalty of the law is attached. It is the attempt to commit the offence which, in the judgment of the law, constitutes the crime, and is as much a breach of neutrality as an actual entrance into the prohibited port. It would be absurd to say that the penalty is not incurred till the unlawful design is fully accomplished, for the offender would, in most cases, be placed, by its accomplishment, beyond the reach of the law. Nor is the word 'attempt' to be understood in a literal and narrow sense. It is not limited to the conduct of the ship at the mouth of the blockaded port, but is applicable to her whole conduct from the moment she has knowledge of the existence of the blockade, and the consequent prohibition of neutral commerce. If she has this knowledge before she begins her voyage, the offence is complete the moment she quits her port of departure :[1] if that knowledge is communicated to her during the voyage, its continued prosecution involves the crime, and justifies the penalty ; if it is not given to her till she reaches the blockading squadron, she must immediately retire, or she is made liable to confiscation. It is not the mere mental intention that the law punishes, but it is the overt act by which the execution of an unlawful intent is begun. This overt act is the starting for, or proceeding towards, the prohibited port, with the knowledge that it is blockaded. The same rules prevail in all analogous cases of unlawful voyages.[2]

Attempt to enter a blockaded port

[1] The 'Columbia,' 1 *Rob.*, 156.

[2] The 'Vrouw Johanna,' 2 *Rob.*, 109 ; the 'Spes' and the 'Irene,' 5 *Rob.*, 76 ; the 'Shepherdess,' 5 *Rob.*, 262 ; the 'James Cook,' *Edw. R.*, 261 ; the 'Nereide,' 9 *Cranch. R.*, 440 ; Vos and Graves *v.* N. Ins. Co., 1 *Caines Cas.*, 7 ; 2 *Johns.*, 180 ; Yeaton *v.* Fry, 5 *Cranch. R.*, 335 ; Fitzsimmons *v.* N. Ins. Co., 4 *Cranch. R.*, 185. A vessel may sail for a blockaded port after a notification of blockade, for the purpose of inquiry whether the blockade continues. (1 *Park on Ins.*, 180.) A vessel approaching a blockaded port with intent to violate the blockade is not entitled to be warned off. (The 'Hallie Jackson,' *Blatchf., P. C.*, 41.) The captors of a vessel taken off a blockaded coast are not entitled to

Inception of voyage

§ 24. Several continental writers of authority contend that the inception of a voyage for a blockaded port, with a knowledge of the existence of the blockade, is not such an offence as to render the vessel subject to seizure upon the high seas. Indeed, they regard such seizure as a violation of the liberty of the seas and of the independence of the sovereign State to which the vessel belongs. But English and American publicists have generally held, and the decisions of British and American Courts of Admiralty seem to sustain, the opinion, that the inception of the voyage, with a knowledge of the blockade, and the *intention* to enter is sufficient in law to constitute the offence and incur penalty, and that the *intention* will be presumed from the fact of commencing the voyage with the knowledge of the existence of the blockade. They say that the vessel had no right to commence the voyage with such knowledge, and that the act of inception is, in itself, as a general rule, illegal and punishable as a breach of neutrality, and, therefore, that the master or owners are not permitted to aver that they merely intended to proceed to the blockaded port to ascertain, by due enquiry, whether the blockade still continued, and to enter it only in case the blockade had ceased.[1]

Distant voyages

§ 25. But this general rule is subject to some important exceptions, or rather the inference, from the inception of the voyage with knowledge of the blockade, of *intention* to violate it, may, in some cases, be removed by proof to the contrary. Thus, where the vessel sails from a distant country, she may clear with a provisional destination to the blockaded port, without incurring the penalty of a breach of the blockade, provided it be clearly and positively proved that she intended to proceed to the blockaded port only in case she ascertained, by due enquiry during the voyage, that the blockade had been raised. This may be shown by instructions to the master not

prove the intention of her crew to violate the blockade, if such intention does not appear from the ship's papers and the depositions. (The 'Aline and Fanny,' 2 *Jur. N. S.*, 142; the 'Fortuna,' *ibid.* 71.

[1] Olivera *v.* Union Insurance Co., 3 *Wheaton R.*, 196, note. *Vide*, also, cases referred to *ante*, § 23.

A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as a prize from the time of sailing, and the intent to violate the blockade is not disproved by evidence of a purpose to call at another neutral port, not reached at time of capture, with an ulterior destination to the blockaded port. (The 'Circassian,' 2 *Wall.*, 135; and see the 'Nayade,' 1 *Newb.*, 366.)

to pursue the voyage unless, by enquiry at a port of the blockading power, or of some neutral State, he found that the blockade had ceased. These instructions to the master must clearly set forth the necessity of the previous enquiry, and the mode in which it has to be made, in order to furnish satisfactory proof of the intentions of the parties. The presumption is against them, and to repel the presumption the equivocal evidence of ambiguous instructions will not be sufficient. But no matter how distant the country from which the vessel sails, she has no right to proceed to the entrance of the blockaded port with a view to ascertain from the blockading force whether she can be permitted to enter. An enquiry from the blockading force is only justified when the master who finds himself in its presence was ignorant that the blockade existed. In other cases, a vesssl found in a situation to make the enquiry, if destined to the blockaded port, is liable, from her previous knowledge, to instant capture. A neutral merchant, says Sir William Scott, has no right to speculate on the greater or less probability of the termination of a blockade, and, on such speculation, to send his vessel to the very mouth of the blockaded river or port, with instructions to the master to enter, if no blockading force appeared, otherwise to demand a warning, and proceed to a different port. A rule that would permit this would be introductory of the greatest frauds.[1]

Exception in case of de facto blockades

§ 26. 'It seems a just inference from the decisions,' says Duer, 'that where the blockade has been constituted simply by the fact of an investment, although its existence was known at the port of departure, previous to the sailing of the neutral ship, she may clear out, provisionally, for the blockaded port; but that, in this, as in former cases, the enquiry upon the result of which the right to complete the voyage must depend, must be made at a port of the blockading State, or of a neutral power. I see no reason to doubt that the prohibition to proceed to the mouth of the blockaded port embraces all cases of a previous knowledge, from whatever source the knowledge may have been derived; and that, in all, its violation is subject to the same penalty.'[2]

[1] The 'Spes' and 'Irene,' 5 *Rob.*, 80; the 'Posten,' 1 *Rob.*, 536, note; the 'Little William,' 1 *Act. Ad. R.*, 141.

[2] Duer, *On Insurance*, vol. i. pp. 699, 670.

When presumption of intention to enter cannot be repelled

§ 27. There are other cases where the criminal intent to violate a blockade, is deduced from the facts existing at the time of capture, and forming a presumption which the party is not permitted to repel by his own denial. Thus, vessels, though not ostensibly destined to the blockaded port, cannot innocently place themselves in a situation that would enable them to violate the blockade at their pleasure. Even when they are bound, by their papers, to different ports, their suspicious approximation to that under blockade will subject them to condemnation. Were they permitted, on the pretence of an intention to proceed to another port, to approach so close to that blockaded as to be able to slip in without obstruction, whenever they choose, it would be impossible that any blockade could be long maintained. Hence, it is not unfair to hold, that the intention of the party, in such cases, to violate the blockade, is a necessary and absolute presumption; although the excuse of necessity, when established, is doubtless to be admitted. The proof, however, must be clear and satisfactory, to remove the inference of guilt.[1]

Neutral vessel entering in ballast

§ 28. For a neutral ship to *enter* a blockaded port, is altogether unlawful. If she entered with a cargo, the legal presumption is, that she went in with the fraudulent intention of delivering it, and if she come out again without delivering it, that fact will not remove the presumption, because some change of circumstance may have altered that intention. If she entered in ballast, it is to be presumed that she went in for the purpose of bringing away property, and, for the same reason as above, her egress, still in ballast, will not oust that presumption. On this point we quote the remarks of Duer. 'A neutral ship,' he says, 'is not permitted to enter a blockaded port, even in ballast, for, although an exception of this kind is allowed in the case of an egress, the reasons on which it is founded are not applicable to an inward voyage. The egress is necessary to restore the ship to the beneficial use of the owners, and can tend, in no degree, to aid the commerce that is meant to be prohibited; but there can be no necessity for sending a ship to a blockaded port, and the intention of procuring a freight is the only assignable motive

[1] The 'Gute Erwartung,' 6 *Rob.*, 182; the 'Arthur,' 1 *Edw. R.*, 202; the 'Charlotte Christine,' 6 *Rob.*, 103.

of the voyage. It is a fair presumption that it is intended that she shall return with a cargo, purchased or prepared in the blockaded port, not that she shall return in ballast, thus rendering the entire expedition a fruitless expense; nor that she will remain useless in port during the uncertain period that the blockade may continue. Nor is it admitted, in such cases, as an adequate excuse, that the object of the voyage was to bring away property that was absolutely locked up by the blockade, and which there was no other mode of extricating. It can rarely happen that other channels of communication are not open, and, in all cases, the property may be sold, and its value remitted in money or in bills. The only adequate excuse, is that of physical necessity.'[1]

Declaration of master

§ 29. We have already stated that any *attempt* to enter a blockaded port, after due information or warning, subjects the party to the penalty of the law; 'but, whether the mere *declaration* of the master, when detained and warned by a ship of the blockading force, of his *intention* to persist in the voyage, notwithstanding the warning, is to be considered as evidence of an actual attempt, justifying an immediate capture, is exceedingly doubtful.' The mere hasty expressions of the master, resulting from resentment and surprise, certainly ought not to produce the condemnation of property entrusted to his care. But where the declaration of the master is proved to be deliberate and is accompanied by such facts as induce the court to believe that he *really* intended to carry it into effect, Sir William Scott was of opinion that it supersedes the necessity of proving further facts, and it is of itself a sufficient ground of condemnation. Chief Justice Marshall, in enumerating several general acts that

[1] Duer, *On Insurance*, vol. i. pp. 671, 672; the 'Comet,' 1 *Edw. R.*, 32; the 'Charlotte Christine,' 5 *Rob.*, 103; the 'Charlotta,' 1 *Edw. R.*, 252.

A neutral professing to be engaged in trade with a neutral port, under circumstances which warrant close observation by a blockading squadron, must keep his vessel, while discharging or receiving cargo, so clearly on the neutral side of the blockading line as to repel, as far as position can repel, all imputation of intent to break the blockade. Neglect of that duty may well justify capture and sending in for adjudication; though in the absence of positive evidence that the neglect was wilful, it might not justify a condemnation. (The 'Dashing Wave,' 5 *Wall.*, 170.)

Communication of neutral ships of war with a blockaded port is permissive only, and such ships should on no account embark any property with the object of passing the blockade, except official despatches of the consul of their own nation or of consuls of nations in amity with the blockading power.

would be justly regarded as evidence of such an attempt, adds: 'Possibly the obstinate, determined declarations of the master, of his resolution to break the blockade, might bear the same interpretation.' The Supreme Court of Pennsylvania have clearly decided that the declarations of the master, however positive and unequivocal, are evidence merely of intention, which, unless followed by some voluntary act after his release, can never constitute the offence to which alone the penalty attaches.[1]

Delay in obeying warning

§ 30. Although the declarations of the master, during his detention, will not constitute in themselves sufficient cause for condemnation, his subsequent conduct, either with or without such declarations, may determine the lawfulness of his capture. It is his duty, on being duly warned, to alter the course of his voyage, as soon as he is at liberty to resume it, and to depart at once from the vicinity of the blockaded port. He has no right to linger in its neighbourhood, on the pretence of a deliberation as to the course he shall pursue, thus compelling the belligerent ship, either to leave him to enter the blockaded port without obstruction, or to wait for an indefinite time to watch his motions. He is bound to manifest, by his immediate acts, his determination to obey the warning he has received. Hence a very short delay, an interval probably of less than an hour, will enable the belligerent to determine whether the master is pursuing the course he is bound to observe, or whether the temporary detention may not lawfully be followed by a final capture. It is scarcely possible that a neutral ship, thus circumstanced, shall escape, otherwise than by an abandonment in good faith of the voyage, that the warning she had received has rendered illegal.

§ 31. If the master persist in his voyage to a blockaded

[1] The 'Apollo,' 5 *Rob.*, 289; Fitzsimmons *v.* Newport Ins. Co., 4 *Cranch. R.*, 185; Calhoun *v.* Ins. Co. of Penn., 1 *Binny R.*, 293. Intoxication of the master is no excuse for a breach of blockade. Sir William Scott remarked on this subject, that if such excuse were permitted, 'there would be eternal carousings in every instance of violation of blockade.' (The 'Shepherdess,' 5 *Rob.*, 262.)

A vessel and cargo were condemned for breach of blockade, the evidence showing an actual hostile destination. (The 'Alma,' 2 *Sprague*, 203.) The case of the 'Revere' (2 *Sprague*, 107) shows what circumstances were considered sufficient to warrant the condemnation of a vessel for an attempt to violate the blockade of Beaufort, N.C., during the American Civil War, 1861.

port, in defiance of a sufficient and legal warning, no excuse is ever admitted for his conduct, and the ship and cargo are invariably condemned. His misconduct may, in no degree, be imputable to his owners, yet their innocence affords no protection to their property. His acts may be in direct violation of their express instructions, may even amount to fraud or barratry: yet his owners will continue to be bound by their legal consequences, to the same extent, as if they had been performed under their previous sanction and authority. Indeed the rule, so far as relates to the ship, and the property of its owners, is universal, that they are concluded by the acts of the master. He is their agent, and the property they have entrusted to his care is, in all cases, responsible for his just observance of the duties of neutrality.

Disregard of warning

§ 32. There are but few cases where the entrance of a vessel into a blockaded port, or an attempt to enter, is ever justified or excused. A license[1] from the government of the blockading State to enter the blockaded port is always a sufficient justification, and, as will be shown hereafter, all such licenses are to be liberally construed. But a general license to enter the port before the blockade would not be available after it had commenced; to constitute a sufficient protection it must authorise the vesssel to enter the port as one blockaded. Again, a physical necessity, arising from the immediate need of water, or provisions, or repairs, produced by stress of weather, which leave no other alternative for safety.[2] 'But as, in order to cover a real design to dispose of

When ingress is excused

[1] The permission, by a blockading force, to some unprivileged ships to go in and others to come out, would vitiate even a blockade by notification; but such permission accorded to certain slave ships, from motives of humanity, was held not to work such a result. The liberation of certain vessels, after seizure and detention for breaking the blockade, was held not to amount to a renunciation of the rights of blockade. (The 'Rolla,' 6 *Rob.*, 374.) Particular licenses will not vitiate a blockade. (The 'Fox,' and others, 1 *Edwards*, 320.)

[2] The 'Forest King,' *Blatchf., P. C.*, 45. A Spanish-owned vessel, in distress, on her way from New York to Havannah, by leave of the admiral commanding the squadron, put into Port Royal, S. C. (then in rebellion and blockaded by a fleet of the United States), and was there seized and made use of by the Government of the United States. She was afterwards condemned as a prize. The Supreme Court decided that she was not a lawful prize or subject to capture, and that her owners were entitled to fair indemnity, though it might be well doubted whether the case was not more properly a subject for diplomatic adjustment. (The 'Nuestra Señora de Regla,' 17 *Wall.*, 29.) Excuse of distress set up as a justifica-

a cargo,' says Duer, 'the pretext of a necessity is easily framed, the excuse is necessarily liable to great suspicion, and in all cases as justly subject to a rigid scrutiny. Hence, it is established that the evidence relied on must clearly show an imperative and overruling compulsion to enter the particular port under blockade. It is not enough that it appears that there were existing and adequate causes to justify the ship in deviating from her voyage, to an intermediate port of necessity. It must also appear that she could not have proceeded, without hazard, to any other port than that blockaded, and that in no other port to which she could have proceeded could her necessary wants have been supplied. In short, the necessity that alone can save her, when captured, from condemnation, must be evident, immediate, pressing, and, from its nature, not capable of removal by any other means than by the course she had adopted.'[1]

Violation of blockade by egress

§ 33. As a general rule the egress of a ship, during blockade, is regarded as a violation of the blockade, and renders her liable, in the first instance, to seizure, and to exempt her from condemnation the most satisfactory proof is required to be given. There are, however, many cases where the egress is innocent,[2] although the knowledge of the blockade, by the master, is admitted or proved. But the taking on board a cargo, with a knowledge of the blockade, is considered a fraudulent act, and the sailing of the ship, with such a cargo, a violation of the blockade. Nor is it necessary that the whole of the cargo should be thus laden; where even a portion of the goods are taken on board after the existence of the blockade is known, the act is considered as a fraud that justifies a general condemnation. The ground of these decisions is, that after the commencement of a blockade, the interposition of a neutral to assist in any way the exportation of the property of the enemy, tends directly to relieve him

tion for entering a blockaded port admitted, the deviation into such a port having been proved to have been necessary under the circumstances. Restitution decreed. (The 'Charlotta,' 1 *Edw.*, 252.)

[1] Duer, *On Insurance*, vol. i. pp. 678, 679; the 'Hurtige Hane,' 2 *Rob.*, 124; the 'Elizabeth,' 1 *Edw.*, 198; the 'Arthur,' 1 *Edw.*, 202; the 'Charlotta,' 1 *Edw.*, 252; the 'Hoffnung,' 2 *Rob.*, 163; Bello, *Derecho Internacional*, pt. ii. cap. viii. § 5.

[2] The 'Gerasimo,' 11 *Moore, P.C. Cases*, 88.

from the distress that the blockade was meant to create. It would defeat a principal object of the hostile proceeding; consequently, after the commencement of the blockade, a neutral is no longer at liberty to make any purchase in the place, with a view to exportation.

When egress is allowed

§ 34. There are a number of cases in which the egress of the neutral vessel, during a blockade, is justified or excused, which we will enumerate: *First*, If the ship is proved to have been in the blockaded port when the blockade was laid, she may retire in ballast, for such egress affords no aid to the commerce of the enemy, and has no tendency to defeat any legitimate purpose for which the blockade was established. *Second*, If the ingress was from physical necessity, arising from stress of weather, and the immediate need of water, or provisions, or repairs. *Third*, Where the entrance with a cargo was authorised by a *license*, such license is construed to authorise the return of the ship with a cargo. *Fourth*, Where a neutral ship, arriving at the entrance of a blockaded port, in ignorance of the blockade, is suffered to pass, there is an implied permission to enter, which fully protects her egress. But this implied permission does not, of necessary consequence, protect the cargo, for its owners may be guilty of a criminal violation of the blockade even where the ship is innocent. *Fifth*, A neutral ship, whose entry into the blockaded port was lawful, is permitted to return with her original cargo that has been found unsaleable, and re-shipped during the blockade. *Sixth*, An equitable exception is allowed in favour of a neutral ship that leaves the port in the just expectation of a war between her own country and that to which the blockaded port belongs. In this case, she is permitted to depart, even with a cargo purchased from the enemy during the blockade, if the purchase was made with the funds of neutral owners, and the investment and shipment were probably necessary to save the property, in the event of a war, from a seizure and confiscation by the enemy. But it is not the mere apprehension of a remote and possible danger that will entitle a neutral ship to this exemption. To save the vessel and cargo from condemnation, it must appear that there was a well-founded expectation of an immediate war, and consequently that the danger of the

seizure and confiscation of the property was imminent and pressing.[1]

Penalty for breach of blockade

§ 35. 'No rule in the law of nations,' says Duer, 'is more certainly and absolutely established than that the breach of a blockade subjects all the property, so employed, to confiscation by the belligerent power whose rights are violated. Among all the contradictory positions that have been advanced on the law of nations, this principle has never been disputed. It is to be found in all the writings on public law; is frequently admitted, and never denied in treaties; is universally acknowledged by all governments that have any degree of civil instruction; and is known to all their subjects, who have any interest to possess the knowledge. The confiscation of the ship, where a violation of the blockade is justly imputed to the owners, or to the master, acting with or without the authority of the owners, is, in all cases, a necessary consequence. . . . The goods that compose the cargo, so far as they are the property of the owners of the ship, upon the principle stated, necessarily share its fate; and even where they are the property of other shippers, as a general rule, they are involved in the same condemnation. It is only in a few cases, where the innocence of the owner is apparent and undeniable, that they are exempt.

[1] It may be questioned how far the Declaration of Paris, 1856, that 'free ships make free goods,' can be extended to the carrying of enemy's property out of a blockaded port. A similar question collaterally arose under the Treaty of 1654 between Great Britain and Portugal, a cargo being documented as the property of Portuguese neutral merchants, though claimed generally, and not verified in the depositions. Restitution was decreed, the Court declining, under the circumstances, to order further proof of the property. (The 'Nostra Señhora da Adjuda,' 5 *Rob.*, 52.)

A neutral ship coming out of a blockaded port, laden with a cargo, in consequence of a rumour that hostilities were likely to take place between the enemy and the country to which the vessel belonged, the regulations of the enemy not permitting a departure in ballast, was held not to be liable to condemnation, and was decreed to be restored. The cargo was condemned, though put on board against the will of the master. (The 'Drie Vrienden,' 1 *Dodson*, 269.) A neutral is not justified in violating a blockade under an apprehension, whether well or ill founded, of seizure of his property by the enemy. He is to rely on his neutrality, and to look to his own Government for protection. (The 'Wasser-Hund,' 1 *Dodson*, 272, n.)

In an English court it is no excuse for breach of blockade by egress that the cargo was intended to be brought to Great Britain. (The 'Byfield,' 1 *Edwards*, 189.) The cargo may be condemned for an attempt by the vessel to violate the blockade, although the vessel has not been taken on process in the suit. (The 'Joseph H. Toone,' *Blatchf., Pr. Cas.*, 641.)

The *presumption* of law, founded on very probable reasoning, is, that the violation of a blockade is intended for the benefit of the cargo, as well as of the ship, and consequently, that it is made with the sanction and under the instructions of its owners; and, in all cases, where the innocence of the owners is not manifested by the papers on board, this presumption prevails to exclude the proof. Thus the rule applies, even where the apparent destination of the ship, judging from her papers, was to a different port, and the attempt to enter that under blockade was a deviation from the regular course of the voyage. Where the only assignable motive for such a deviation is an intention to dispose of the cargo in the blockaded port, and, by such a disposition, to promote the interests of its owners, they are not allowed to contradict the presumption that the master, thus visibly acting for their benefit, was not also acting under their secret authority.'[1]

When cargo is exempted from condemnation

§ 36. But if it be clearly established, by proofs found on board at the time of the capture, that, at the inception of the voyage, the owners of the cargo stood clear, even from a possible intention of fraud, their property will be excepted from the penal consequences of the breach of the blockade. Thus, where the illegality consists in the misconduct of the master in attempting to enter a blockaded port, if it be certain that, when the voyage commenced, the existence of the blockade neither was, nor could have been, known at her port of departure, the owners of the cargo could not possibly have contemplated a breach of the blockade. In such cases, the act of the master, although it prevail to condemn the ship, will not condemn the cargo also, for there is no general or necessary relation of principal and agent between its owners and the master. So, also, in case of egress, the ship may be subject to condemnation, and yet the cargo may be restored, although laden during the blockade, if the innocence of its owners be certain and indisputable. Thus, if their orders for the shipment of the goods were given to their agents in the blockaded port before the blockade existed, or was known to exist, and they could not, by any diligence, after the blockade was known to them, countermand their orders in time to prevent their execution, the owners are deemed innocent. In such cases, the agents and owners do not stand in the same

[1] Duer, *On Insurance*, vol. i. pp. 683-685.

relative situation of ordinary agents and principals, for the interests of the former are not only distinct from, but actually opposed to, those of the latter. It must be remarked, however, that, in all cases, whether of ingress or egress, in which an exception is allowed in favour of the cargo, the evidence of the innocence of its owners must be so clear and certain as to exclude any possible imposition on the mind of the court. Another exception, in this relation, deserves notice. A neutral, domiciled in an enemy's country, *in itinere*, on his return home to reside, was a passenger, with his family, in a neutral vessel, which was guilty of a breach of blockade. The specie which he had with him, for the support and comfort of himself and family, was taken as prize. But the supreme court decreed restitution, on the ground that he had a right to carry with him such property, which was not a mercantile adventure, and that, being personally in no fault, such property was not forfeited by a breach of blockade by the vessel in which he had taken passage.[1]

Duration of offence

§ 37. To justify a capture for the violation of a blockade, or the attempt to violate it, the offence must continue to exist at the time of seizure. In technical language, the ship must be then *in delicto* In cases where the ship has violated the blockade by egress, the *delictum* continues during her whole voyage, till she has reached her final port of destination. Until then, as the offence consists, not in the mere attempt, but in an actual breach, no change of circumstances, or subsequent repentance, can efface the guilt. It is not cancelled by a mere interruption of the voyage, such as the stopping of the ship at an intermediate port, either from necessity or design; when she resumes her voyage, she becomes again subject to the penalty of the law. But when

[1] The 'Exchange,' 1 *Edw. R.*, 43; the 'Alexander,' 4 *Rob.*, 93; the 'Mercurius,' 1 *Rob.*, 80; the 'Neptunus,' 3 *Rob.*, 173; the 'Adelaide,' 3 *Rob.*, 281; the 'Manchester,' 2 *Act. R.*, 687; the United States *v.* Guillem, 11 *Howard R.*, 62. The acts of a master in breach of a blockade affect the cargo equally with the vessel if the cargo is laden on board after the blockade has become effective as to the vessel. (The 'Hiawatha,' *Blatchf. Pr. Cas.*, 1; the 'Crenshaw,' *ibid.* 23.) Where a vessel and cargo were owned by unnaturalised foreigners, residing in the enemy's country, who came in her, out of a blockaded port of the enemy, with the sole purpose of escaping with their property from the enemy, and delivering that and themselves to the blockading squadron, and to the authority of the United States, it was held by the District Court of New York that they should be restored, but without costs, there being probable cause for the seizure. (The 'Evening Star,' *Blatchf. Pr. Cas.*, 582.)

a ship sails for a blockaded port, with a knowledge of the blockade, and the intention to violate it, the offence is so far complete as to justify her immediate capture; yet, as it exists only in an attempt, the *delictum* does not necessarily continue during the whole of her subsequent voyage. If, previous to her capture, the blockade had ceased to exist, or the master, from the information of a ship of war of the blockading State, had just grounds for believing that such was the fact, or had altered his destination, with the intention of not proceeding at all to the blockaded port, the offence no longer exists, and that which had existed is no longer punishable. To constitute the offence, three circumstances must be found to co-exist: the fact of a blockade, the party's knowledge of its existence, and his intention to violate it; and, in each of the above cases, an indispensable circumstance is wanting. The *delictum*, therefore, at the time of capture, had wholly ceased, and both ship and cargo will be restored.

Insurance, how affected by violation of a blockade

§ 38. It may be stated, in general terms, that an insurance made in the country of the blockading State, is necessarily invalid from the time the property insured becomes liable to confiscation by the violation, or attempted violation, of a blockade, and that the invalidity continues so long as this liability exists. Where the ship is insured upon time, although the contract may not be void in its origin, it may be rendered so, by the contravention of a blockade, for the particular voyage to which the legal penalty attaches; but where the voyage has been terminated, and the liability to capture no longer exists, it seems probable that the obligation of the contract would be held to revive. The effect of a supervening war, by which the property insured is rendered that of an enemy, according to Lord Ellenborough, is to exonerate the insurers from all the risks of the policy during the continuance of the hostilities. This language plainly implies that the contract is not annulled, but merely suspended by the operation of the war, and that the return of peace, should the policy not have expired by its own terms, will restore its life and obligatory force. The doctrine seems, in itself, just and reasonable, and, in cases where the policy is not so entire as to preclude any separation of its risks, may be applied, with equal justice, to every case of supervening illegality; that is, an illegality arising after the commence-

ment of the risks. Such seems to be the rule established by the decisions of the courts of Common Law in England, although the opposite rule has been assumed in the United States.[1]

Hautefeuille's theory of the law of blockades

§ 39. Hautefeuille's theory of blockades differs from those of the generality of writers on international law, and especially from the decisions of English and American jurists. He considers the right of maritime blockade to result from the right of conquest, by the successful belligerent's getting military possession of an enemy's port, or of a belt of territorial sea surrounding or commanding it, precisely as he would of a belt of land around a fort in case of a siege. The conqueror, being thus in possession of a portion of an enemy's territory, may, so long as he retains that possession, extend over it his own laws and jurisdiction. He may prohibit foreigners from entering such territory, either for commerce or any other purpose, or he may permit them to enter on such terms as he may see fit to impose, precisely as he might do if it were a part of his most ancient dominion. The right of blockade, therefore, extends over only so much of the sea as is, in international law, regarded as territorial and liable to conquest, although the blockading force may be stationed outside of the territorial limit, and consequently on the high sea, which can never be subjected to local jurisdiction. In order to blockade a maritime port, or territorial sea, it is necessary that the blockading force acquire the sovereignty of it, and actually hold it in possession. This definition of a blockade gives rise to very few questions with respect to its establishment or continuance, nor can there be much dispute about what is to be regarded as a violation of it. It is a visible, material fact, and any notification of that fact would be unnecessary and superfluous, for neutrals can *see* the conqueror's possession, and readily ascertain from him whether or not they are permitted to enter, and if so, upon what terms. So long as they remain without the line of territorial jurisdiction they violate no rights of blockade. If they pass, or attempt to pass, against the will of the new sovereign, this magic line, they become liable to capture; but they must be

[1] See Duer, *On Insurance*, vol. i. pp. 688, 690, and note ii. pp. 463–478; Brandon *v.* Curling, 4 *East.*, 410; Harratt *v.* Wise, 9 *B. and C.*, 712; Naylor *v.* Taylor, *ibid.* 718; Medeiras *v.* Hill 8 *Bing. R.*, 231; ch. xxiii. § 21, *post.*

seized while within the territorial limits, for they cannot be pursued upon the high seas, as no rights of blockade can extend beyond the sovereignty which was acquired by conquest and is continued by actual possession. We think Hautefeuille has confounded the rights of blockade with the rights of military occupation, which are not only distinct in their nature, but essentially different in their legal consequences. Nevertheless, his views are worthy of attention, and he has maintained them with marked ability. It is not so much our object in this work to discuss theories, or to determine what the law of blockades *ought to be*, as to ascertain what the law *now is*, according to the decisions of prize courts, and the opinions of the best writers on international jurisprudence. The rules of maritime war, as now practised, undoubtedly present some anomalies which cannot be easily reconciled with any abstract theory.[1]

[1] Hautefeuille, *Des Nations Neutres*, tit. ix.; Hautefeuille, *Hist. du Droit Mar. Int.*, pt. iii. ch. i. § 1; Lampredi, *Commerce des Neutres*, pt. i. § 5; Galiani, *Dei Doveri*, &c., cap. ix.; Massé, *Droit Commercial*, liv. ii. ch. ii.

CHAPTER XXVI

CONTRABAND OF WAR

1. General law of contraband—2. All contraband articles to be confiscated—3. Ancient rule that cargo affects the ship—4. Modern rule—5. Cases where ship also is condemned—6. Ordinary penalty not averted by ignorance or force—7. The 'Springbok'—8. Return voyage—9. If not contraband at time of seizure—10. Transfer of such goods from one port to another—11. Destination need not be immediate to enemy's port—12. The 'Commercen'—13. Differences of opinion among text-writers—14. Views of Grotius and others—15. Of modern publicists—16. Ancient treaties and ordinances—17. Modern treaties and ordinances—18. Conflicting decisions of prize courts—19. There is no fixed universal rule—20. Implements and munitions of war—21. Manufactured articles—22. Unwrought articles—23. Intended use deduced from destination—24. Provisions—25. Pre-emption—26. British rule of pre-emption—27. Contested by other nations—28. Insurance on articles contraband of war.

Definition of contraband

§ 1. HAVING already discussed the general rights and duties of neutrals, and the liability of neutral property to capture and condemnation for violation of the law of sieges and blockades, we will now consider the rules of international law with respect to goods contraband of war. The term *contraband* (*contrabandum*, or *contra bannum*) has been used from time immemorial to express a prohibition of certain kinds of commerce. Such prohibitions are found in the laws of Justinian, in the decrees of the Popes and Councils in the time of the Crusades, and more especially in those issued by different powers during the wars of the Hanseatic League. The theory of the present law of contraband, however, had its origin in the school of Bologna, but its complete development was coincident with the development of the modern laws of commerce. By this term we now understand a class of articles of commerce which neutrals are prohibited from furnishing to either one of the belligerents, for the reason that, by so doing, injury is done to the other belligerent. To

carry on this class of commerce is deemed a violation of neutral duty, inasmuch as it necessarily interferes with the operations of the war by furnishing assistance to the belligerent to whom such prohibited articles are supplied. But the trade of neutrals with belligerents, in articles not contraband, is absolutely free, unless interrupted by blockade.[1]

Contraband articles confiscated

§ 2. 'In the view of international law,' says Lord Westbury, 'the commerce of nations is perfectly free and unrestricted. The subjects of each nation have a right to interchange the products of labour with the inhabitants of every other country. If hostilities occur between two nations, and they become belligerents, neither belligerent has a right to impose, or to require a neutral government to impose, any restrictions on the commerce of its subjects.' But if the trade of the neutral in munitions of war—or contraband articles—interferes with the rights of either belligerent, then that belligerent has an international right to seize such goods. There is no difference of opinion with respect to this general rule, whatever may be the extent of disagreement with respect to what articles may properly be regarded as contraband. The noxious articles themselves (if decided to be *contraband*) are invariably condemned, and no defence or plea can save them from confiscation, when their character as contraband, and their destination to a hostile port or country, are admitted or established. But the extent of the penalty, for the carriage of such articles, does not seem to be fixed by any positive or uniform rule; or, at least, the decisions seem to vary with the special circumstances of each case. Nevertheless, it may be possible to deduce from these apparently conflicting decisions of Courts of Admiralty, some general principle which may form the basis of the rule of international law with respect to the carriage of such prohibited articles.[2]

[1] The 'Peterhoff,' 5 *Wall.*, 28.

[2] *Ex parte* Chavasse, *in re* Grazebrook, 34 *L. J., Bank.*, 17; Seton *v.* Low, 1 *Johns. N. Y. Cases*, 1, (N.S.) 249; the 'Helen,' 35 *L. J. Ad.*, 2; Kent, *Com. on Am. Law*, vol. i. pp. 135-143; Ortolan, *Diplomatie de la Mer*, liv. iii. ch. vi.; Garden, *De la Diplomatie*, liv. vii. § 4; Heffter, *Droit International*, § 161; Nau, *Völkerseerecht*, §§ 193 et seq.; Jacobson, *Seerecht*, &c., pp. 422, 423; Pando, *Derecho Internacional*, p. 496; Hautefeuille, *Des Nations Neutres*, title viii. § 1; Bello, *Derecho Internacional*, pt. ii. cap. viii. § 4; Poehls, *Seerecht*, &c., b. iv. p. 1104; Kaltenborn, *Seerecht*, b. ii. p. 420; Lampredi, *Commerce des Neutres*, pt. i. § 7.

Ancient rule in regard to ships

§ 3. By the ancient laws of war, as established by the usages of European nations, the contraband cargo affected the ship, and involved it in the sentence of condemnation. The justice of this rule is vindicated by Bynkershoek and Heineccius, and it cannot be said that the penalty was unjust in itself, or unsupported by the analogies of the law. Grotius does not particularly discuss the case of the ship carrying contraband, but alludes to the subject in very general terms. Soon after his time a relaxation began to be introduced into treaties, but this relaxation, at first, applied only to cases in which the owner of the vessel might be supposed to be a stranger to the transaction. Subsequently, the stipulation in treaties became more general, although the relaxation was directed, in its particular application, as well as in its origin, only to such cases as afford a presumption that the owner was innocent, or the master deceived.[1]

Modern rule

§ 4. By the modern practice of the prize courts of England and the United States, and not opposed, it is believed, by other nations, a milder rule has been adopted, and the carrying of articles contraband of war is now attended only with the loss of freight and expenses, except where the ships belong to the owner of the contraband cargo, or where the simple misconduct of carrying contraband articles is connected with other circumstances which extend the offence to the ship also. Sir William Scott says, 'Anciently, the carrying of contraband did, in ordinary cases, affect the ship, and although a relaxation has taken place, it is a relaxation the benefit of which can only be claimed by fair cases. The aggravation of fraud justifies additional penalties.'[2]

§ 5. Where the transportation of the contraband articles is prohibited by the stipulations of a treaty, to which the

[1] Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. x.; Heineccius, *De Nav.*, &c., cap. ii. § 6; Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. i.; the 'Ringende Jacob,' 1 *Rob.*, 90; the 'Mercurius,' 1 *Rob.*, 288, note.

[2] The 'Franklin,' 3 *Rob.*, 221, note; Polson, *Law of Nations*, p. 64; the 'Jonge Tobias,' 1 *Rob.*, 329; the 'Neptunus,' 3 *Rob.*, 108; the 'Jonge Margaretha,' 1 *Rob.*, 189; the 'Sarah Christina,' 1 *Rob.*, 242. In determining the question of costs and expenses, the fact of conveyance of contraband may be properly taken into consideration, with other circumstances, such as want of frankness in a neutral captain, engaged in a commerce open to great suspicion, and his destruction of some kind of papers in the moment of capture, and this, although it seemed almost certain that the ship was destined to a port really neutral, and with a cargo for the most part neutral in character and destination. (The 'Peterhoff,' 5 *Wall.*, 28; the 'Springbok,' *ibid.* 1.)

government of the neutral shipowner is a party, the forfeiture of the freight is extended to the ship, on the ground that the criminality of the act is enhanced by the violation of the additional duty imposed by the treaty. An attempt to conceal the destination of the ship, by false papers, will lead to the same result. 'I desire it to be considered as the settled rule of law received by this court,' says Sir William Scott, in the case of the 'Franklin,' 'that the carriage of contraband with a false destination will work a condemnation of the ship as well as the cargo.' There are other cases of misconduct which are held by the courts to involve the confiscation of the ship carrying contraband; as the privity of the owner of the ship to the contraband; the concealment of the contraband in the outward voyage; the misconduct of the supercargo, the agent of the owner; the contraband traffic of the officer placed in command of a private vessel by the Board of Admiralty, and where the owner of the contraband is also owner, or part owner, of the ship. But these cases will be more particularly discussed in the chapter on violation of neutral duties.[1]

Cases where the ship also is condemned

§ 6. The ordinary penalty of carrying articles contraband of war, is the confiscation of the goods and the loss of the freight and expenses to the ship. This penalty is not to be averted by the allegation that the owners or master were ignorant of the true nature of the articles, or that, by the threat or violence of the enemy, they were compelled to receive and transport them. Such excuses, if allowed, would be constantly urged, and by robbing the prohibition of contraband of its penal character, would convert it into a mere nugatory threat. Where the cargo does not wholly consist of contraband goods, the innocent articles of innocent shippers are restored; but all the goods of the owner of the contraband articles, even those which are innocent, share the same fate.[2]

Plea of ignorance or force

§ 7. The inception of the voyge is held to complete the offence; and from the moment that the vessel, with the con-

The 'Springbok'

[1] The 'Franklin,' 3 *Rob.*, 221; Duer, *On Insurance*, vol. i. p. 625; the 'Baltic,' 1 *Acton*, 25; Blewitt *v.* Hill, 13 *East*, 13; the 'Floreat Commercium,' 3 *Rob.*, 178; the 'Neutralitet,' 3 *Rob.*, 295; the 'Enrom,' 2 *Rob.*, 6; the 'Ranger,' 6 *Rob.*, 125; the 'Edward,' 4 *Rob.*, 68.

[2] Duer, *On Insurance*, vol. i. p. 625; the 'Oster Resoer,' 4 *Rob.*, 199; the 'Caroline,' *ibid.* 260; the 'Richmond,' 5 *Rob.*, 325; the 'Charlotte,' *ibid.* 275.

traband articles on board, quits her port on a hostile destination, the capture may be legally made. It is by no means necessary to wait till the ship and goods are actually endeavouring to enter the enemy's port. The voyage being illegal at its commencement, the penalty immediately attaches and continues to the end of the voyage, or at least so long as the illegality exists.[1]

The decision in the case of the 'Springbok' has been the subject of great discussion among publicists. The 'Springbok' left London on December 9, 1862, for Nassau, and when 150 miles from the latter port was captured by the Federal cruiser 'Sonoma,' the ground being that she intended to run the blockade. The cargo belonged to one owner, some of it being contraband and some not. The vessel and her cargo were condemned by the District Court of New York, following the cases of the 'Neutralitet' (3 *Rob.*, 296); the 'Franklin' (*ibid.* 217); the 'Ranger' (6 *Rob.*, 126); and the 'Baltic' (1 *Acton*, 25). This decree was reversed by the Supreme Court of the United States in December 1866, so far as concerns the ship, following the case of the 'Bermuda' (3 *Wall.*, 514), but it was affirmed as to the cargo. There was nothing in the papers when taken from the 'Springbok' to show that the intention was to run the blockade. The condemnation of the cargo of the 'Springbok' was put by the Chief Justice on the alternative of either contraband or blockade-running. 'We do not refer,' he said, 'to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it must be condemned if really destined for Nassau and not beyond; and, contraband or not, it must be condemned if destined to any rebel port, for all rebel ports were under blockade. Upon the whole case we cannot doubt that the cargo was originally shipped with intent to violate the blockade; that the owners of the cargo intended that it should be transhipped at Nassau into some vessel more likely to succeed in running safely to a blockaded port than the "Springbok;" that the voyage from London to the blockaded port was, as to cargo, both in law and in the intent of the parties, one voyage, and that the liability to condemnation, if captured during any part

[1] The 'Imina,' 3 *Rob.*, 168; the 'Trende Sostre,' 6 *Rob.*, 390, note.

of that voyage, attached to the cargo from the time of sailing.' The substance of the judgment of the court will be found in the note below.[1] The British Foreign Office was advised on March 13, 1863, by Sir William Atherton, Sir Roundell Palmer, and Dr. Phillimore (the then law officers of the Crown) that 'there was nothing to justify the seizure of the bark "Springbok" and her cargo, and that her Majesty's Government would be justified in demanding the immediate restitution of the ship and cargo, without submitting to any adjudication by an American prize court.' The ruling of the Supreme Court of the United States has inflicted a serious blow on neutral rights, and is in conflict with the views generally expressed by the United States, and it is doubtful

[1] Where the papers of a ship, sailing under a charter party, are all genuine and regular, and show a voyage between ports neutral within the meaning of international law; where there has been no concealment nor spoliation of them; where the stipulations of the charter party, in favour of the owners, are apparently in good faith; where the owners are neutrals, have no interest in the cargo, and have not previously in any way violated neutral obligations, and there is no sufficient proof that they have any knowledge of the unlawful destination of the cargo—in such a case, its aspect being otherwise fair, the vessel will not be condemned, because the neutral port, to which it is sailing, has been constantly and notoriously used as a port of call and transshipment, by persons engaged in systematic violation of blockade, and in the conveyance of contraband of war, and was meant, by the owners of the cargo carried on the ship, to be so used in regard to it. The fact that the master declared himself ignorant as to what part of his cargo, of which invoices were not on board (having been sent by mail to the port of destination), consisted—such part being contraband—and that he also declared himself ignorant of the cause of capture, when his mate, boatswain, and steward all testified that they understood it to be the vessel's having contraband on board, was held to be insufficient of itself to infer guilt to the owners of the vessel, which was in no way compromised with the cargo. But the misrepresentation of the master, as to his knowledge of the ground of capture, was held to deprive the owners of the costs on restoration. The cargo was condemned for intent to run a blockade: the vessel was sailing to a port such as that above described, the bills of lading disclosed the contents of 619 out of 2,007 packages, which made the cargo, the contents of the remaining 1,388 being not disclosed; both they, and the manifest, made the cargo deliverable by order, the master being directed by his letter of instructions to report himself, on arrival at the neutral port, to *H.*, who 'would give him orders as to the delivery of his cargo;' a certain portion of the cargo, whose contents were undisclosed, was specially fitted for the enemy's military use, and a larger part was capable of being adapted to it; other vessels, owned by the owners of the cargo, and by the charterer, and sailing ostensibly for neutral ports, were, on invocation, shown to have been engaged in blockade-running, many packages on one of the vessels, and numbered in a broken series of numbers, finding many of their complemental numbers on the vessel under adjudication. (The 'Springbok,' 5 *Wall.*, 1.)

if it would be adopted by the courts of Great Britain; see the case of Hobbs *v.* Henning, 34 *L. J.* (N.S.), 117.

Return voyage

§ 8. Where the contraband goods are not taken *in delicto*, in the actual prosecution of the outward voyage, and the return voyage is distinct and independent, the penalty is not generally held to attach, either upon the proceeds of the goods or on the ship upon her return voyage. But where they are both inseparably connected in their original plan, so as to form parts of a continuous voyage, the penalty is generally considered as attaching in every stage till its final completion. Such is the doctrine established by the decisions of the English Admiralty, and seemingly admitted by the Supreme Court of the United States. Wheaton has questioned its soundness, but his objection, that *it extends the offence indefinitely*, is completely answered by the decisions themselves, which expressly limit the offence and its penal consequences to completion of the *entire* voyage. Ortolan contests this rule of the continuation of the offence during the return voyage, on the ground that the ship should, in all cases, be exempted from any penalty, and the confiscation confined to the contraband articles. He has supported his doctrine by strong and logical arguments, but, however correct it may be in theory, it is not supported by the practice of the great maritime powers of the world. The general rule of exemption is, undoubtedly, well established, but the exceptions indicated are supported by good authorities, and generally admitted in practice.[1]

If not contraband at time of seizure

§ 9. It must be observed that the offence does not necessarily continue during the entire outward voyage, even where it was completed by the mere inception with contraband articles on board. 'Where there is positive evidence,' says Duer, 'that, previous to the capture, the voyage had been changed, by the substitution of an innocent port of destination, or that the original port, by capitulation or otherwise, had ceased to be hostile, as the goods were not contraband

[1] Ortolan, *Diplomatie de la Mer*, liv. iii. ch. vi.; Hubner, *De la Saisie des Bâtiments*, liv. ii. ch. iv. § 4; Zouch, *Juris et Jur. Fecialis*, p. ii. cap. viii.; Wheaton, *On Captures*, p. 183; the 'Nancy,' 3 *Rob.*, 127; the 'Rosalie and Betty,' 2 *Rob.*, 348; the 'Baltic,' 1 *Act.*, 25; the 'Joseph,' 8 *Cranch.*, 451; the 'Caledonia,' 1 *Wheat.*, 100; 'Christiansberg,' 6 *Rob.*, 381; Carrington *v.* the M. Ins. Co., 8 *Peters.*, 521; the 'Frederick Molke,' 1 *Rob.*, 87; the 'Charlotte,' *ibid.* 386; the 'Margaret,' 1 *Act. R.*, 133.

when seized, the capture is invalid, and restitution is decreed.' Although the penalty is not averted by the possibility that the intention to prosecute an illegal voyage, which is in the progress of execution, will be changed before its completion, yet, if the intention, when the capture was made, had, in good faith, been abandoned, or was no longer capable of execution, the *corpus delicti* is extinguished, and the penalty cannot be sustained.[1]

Transfer from one port to another

§ 10. The illegality of the transportation of contraband goods is not confined to an original importation into an enemy's country. The transportation of such articles from one port of the enemy to another is equally unlawful, and is subject to be treated in the same manner as an original importation. It may equally and as directly tend to assist the enemy in the prosecution of the war. 'The transfer of contraband from one port of a country to another,' says Sir William Scott, 'is subject to be treated in the same manner as an original importation into the country itself.'[2]

If for enemy's use in a neutral port

§ 11. In order to constitute the unlawfulness of the transportation of contraband, it is not necessary that the immediate destination of the ship and cargo should be to an enemy's country or port. If the goods are contraband and destined for the direct use of the enemy's army or navy, the transportation is illegal, and subject to the ordinary penalty. Thus, if an enemy's fleet be lying, in time of war, in a neutral port, and a neutral vessel should carry contraband goods to that port, not intended for sale in the neutral market, but destined for the exclusive supply of the hostile forces, such conduct would be a direct interposition in the war by furnishing essential aid in its prosecution, and consequently would be a flagrant departure from the duties of neutrality.

The 'Commercen'

§ 12. In the case of the 'Commercen,' a Swedish vessel captured by an American cruiser in the act of carrying a cargo of barley and oats for the supply of the allied armies in the Spanish peninsula, the United States being at war with Great Britain, but at peace with Sweden and the other powers allied against France, the Supreme Court of the United States held that the voyage was illegal, the cargo was condemned, and the neutral carrier denied his freight. The cargo, in this case,

[1] Duer, *On Insurance*, vol. i. pp. 629, 571, 572.
[2] The 'Edward,' 4 *Rob.*, 70.

was enemy's property, but all the members of the court concurred in the principle that a neutral carrying supplies for the enemy's naval or military forces, was engaged in an illicit voyage inconsistent with the duties of neutrality, and that it was a very lenient administration of justice to confine the penalty to a mere denial of freight. Some doubts have arisen as to the propriety of the decision in the particular case, but none as to the truth of the general principles upon which it was founded. Chief Justice Marshall dissented from the majority of the court, but his dissent was founded on the special circumstances of the case: first, that the war in the Spanish peninsula was so distinct from that between England and the United States, that the latter could not be prejudiced by the aid furnished; and, second, that Sweden being an ally with England in the war against France, her subjects might lawfully aid the British forces engaged in that war, and without violating their neutrality toward the United States.[1]

Disagreement as to what particular articles are contraband

§ 13. All writers on international law are agreed, that implements and munitions of war, and articles, which, in their actual condition, are of immediate use for warlike purposes, are to be deemed contraband, whenever they are destined to an enemy's country, or to an enemy's use; but, beyond this, there is such a diversity of opinion among text-writers that it is exceedingly difficult, if not impossible, to deduce from such works any well-established and satisfactory principles to guide our decision on the points in dispute. We will proceed to refer to the discussions of publicists of the highest authority on these questions, without attempting, however, to reconcile their differences of opinion.

Views of Grotius and others

§ 14. Grotius divides all articles of trade into three classes: 1. Implements and materials which, by their nature, are suitable to be used in war. 2. Articles of taste and luxury, useful only for civil purposes, as books, paintings, &c. 3. Articles which are of indiscriminate use in peace and war, as provisions, naval stores, &c. Articles of the *first* class are always contraband; those of the *second* class never; those of the *third* class may or may not be contraband, according to the particular circumstances of the war. But little objection can be made to this classification, but it leaves the entire difficulty unsettled, as the question immediately arises with

[1] The 'Commercen,' 1 *Wheat. R.*, p. 322.

respect to what articles are to be assigned to each class, and under what particular circumstances articles of the third class are subject to capture as contraband of war. Loccenius is of opinion that provisions are universally contraband, and refers to many instances in which different nations had enforced the prohibition. Heineccius includes in the list of contraband articles of promiscuous use in peace or war, such as provisions, naval stores, &c. Vattel makes a similar distinction to that of Grotius, though he includes timber or naval stores among articles which are liable to capture as contraband, and considers provisions as such only under certain circumstances, as 'when there are hopes of reducing the enemy by famine.' Valin and Pothier wholly exclude provisions, but admit that by general usage, when they wrote, naval stores were prohibited. Bynkershoek strenuously contends against admitting into the list of contraband articles of promiscuous use in peace and war, and denies that any other than those which, in their actual state, are immediately applicable to warlike purpose, can properly be enumerated as prohibited. Sir Leoline Jenkins, in a letter to Charles II., says: 'I am humbly of opinion that nothing ought to be judged contraband by the general law of nations, but what is directly and immediately subservient to the uses of war, except it be in the case of besieged places.'[1]

Of modern writers

§ 15. British authors have generally favoured the extension of the list of contraband to all articles of promiscuous use in peace and war. Reddie defines contraband to be: '1. Articles which have been constructed, fabricated, or compounded into actual instruments of war. 2. Articles which, from their nature, qualities, and quantities, are applicable and useful for the purposes of war. 3. Articles which, although not subservient generally to the purposes of war, such as grain, flour, provisions, naval stores, become so by their special and direct destination for such purposes, namely, by their destination for the supply of armies, garrisons, or fleets, naval arsenals, and posts of military equipment.' The following list is given by Sir Godfrey Lushington, permanent

[1] *Life and Correspondence of Sir L. Jenkins*, vol. ii. p. 751; Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. i. § 5; Loccenius, *De Jure Marit.*, lib. i. cap. 4, § 9; Heineccius, *De Navibus*, cap. i. § 14; Vattel, *Droit des Gens*, liv. iii. ch. vii. § 112; Valin, *Com. sur l'Ord.*, liv. iii. tit. ix. art. xi.; Bynkershoek, *Quæst. Jur. Bel.*, liv. i. cap. x.

Under-Secretary of State for the Home Department, viz. :— '*Goods absolutely contraband.*—Arms of all kinds and machinery for manufacturing arms. Ammunition and materials for ammunition, including lead, sulphate of potash, muriate of potash, chloride of potassium, chlorate of potash, and nitrate of soda. Gunpowder and its materials, saltpetre and brimstone; also gun cotton. Military equipments and clothing. Military stores. Naval stores, such as masts (the 'Charlotte,' 5 *Rob.*, 305), spars, rudders, and ship timber (the 'Twende Brodre,' 4 *Rob.*, 33), hemp (the 'Apollo,' 4 *Rob.*, 158), and cordage, sail cloth (the 'Neptunus,' 3 *Rob.*, 108), pitch and tar (the 'Jonge Tobias,' 1 *Rob.*, 329), copper fit for sheathing vessels (the 'Charlotte,' 5 *Rob.*, 275). Marine engines, and the component parts thereof, including screw propellers, paddle wheels, cylinders, cranks shafts, boilers, tubes for boilers, boiler plates, and fire bars, marine cement, and the materials used in the manufacture thereof, as blue lias and Portland cement; iron in any of the following forms: anchors, rivet iron, angle iron, round bars of from $\frac{3}{4}$ to $\frac{5}{8}$ of an inch diameter, rivets, strips of iron, sheet plate iron exceeding $\frac{1}{4}$ of an inch, and low moor and bowling plates.' '*Goods conditionally contraband.*—Provisions and liquors fit for the consumption of army or navy (the 'Haabet,' 2 *Rob.*, 182), money, telegraphic materials, such as wire, porous cups, platina, sulphuric acid, and zinc (*Parl Papers*, 'N. America,' No. 14, 1863), materials for the construction of a railway, as iron bars, sleepers, &c.; coals, hay (*Hosaek*, 45), horses, rosin (the 'Nostra Signora de Begona,' 5 *Rob.*, 98), tallow (the 'Neptunus,' 3 *Rob.*, 108), timber (the 'Twende Brodre,' 4 *Rob.*, 37).'[1]

American writers, such as Kent, Wheaton, and Duer, have generally limited their remarks to stating the opinions of the older text-writers, and the decisions of English and American courts of prize. Wheaton is evidently disposed to exclude entirely, from the list of contraband, provisions and other articles of promiscuous use. Kent and Duer are of opinion that such articles may, or may not, be contraband, according to the circumstances of the case.[2] In the case of the 'Peter-

[1] Reddie, *Researches, Hist. and Crit., on Marit. Int. Law*, vol. ii. p. 456; Lushington, *Manual of Naval Prize Law*, p. 35.

[2] Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 26; Kent, *Com. on Am. Law*, vol. i. pp. 135 143; Duer, *On Insurance*, vol. i. pp. 622-644.

hoff'[1] the Supreme Court of the United States, in 1866, was of opinion that a strictly accurate and satisfactory classification of contraband is perhaps impracticable, but that which is best supported by English and American decisions divides all merchandise into three classes:—1st. Articles manufactured primarily or ordinarily used for military purposes in time of war, destined to a belligerent country or places occupied by the army and navy of a belligerent, are always contraband and liable to condemnation. 2nd. Articles which may be and are used for purposes of war or peace, according to circumstances, are contraband only when actually destined to the military or naval use of a belligerent. 3rd. Articles exclusively used for peaceful purposes are not contraband at all, though liable to seizure and condemnation for violation of blockade or siege. The Court further held that contraband articles contaminate the parts not contraband of a cargo if belonging to the same owner; and that the non-contraband must share the fate of the contraband, viz. confiscation.

Continental writers, generally, contend against the English extension of contraband. Among them are Hautefeuille and Ortolan. The former admits but one class of contraband, and confines it to objects of first necessity for war, which are exclusively useful in war, and which can be directly employed for that purpose, without undergoing any change. The latter declares his opinion to be, that, on principle, under ordinary circumstances, arms and munitions of war, which serve directly and exclusively for belligerent purposes, are alone contraband. He admits that in special cases certain determinate articles, whose usefulness is greater in war than in peace, are, from circumstances, in their character contraband, without being actually arms and munitions of war, such as timber, evidently intended for the construction of ships of war, or for gun carriages, boilers or machinery for the enemy's steam vessels, sulphur, saltpetre, or other materials for arms or munitions of war. Heffter is of opinion that certain articles, as provisions, not in their nature contraband, may, in certain cases, from their destination and intended use, be regarded as such.[2]

§ 16. And the same discordancy in the definition of con

[1] 5 *Wall.*, 28.

[2] Hautefeuille, *Des Nations Neutres*, tit. viii. § 2; Ortolan, *Dip. de la Mer*, tome ii. ch. vi.; Heffter, *Droit International*, § 160.

Discordancy of earlier treaties and ordinances

traband is to be found in the conventional law of nations, as established by treaties, the provisions of which are various and contradictory—even of those made, at different periods, between the same nations.[1] The same may be said of marine ordinances and diplomatic discussions. The marine treaty between England and Holland, December 1, 1674, comprehends as contraband of war pieces of ordinances, with all implements belonging to them, fire balls, powder, matches, bullets, pikes, swords, lances, spears, halberts, guns, mortar-pieces, petards, grenadoes, musket rests, bandaliers, saltpetre, muskets, musket shots, helmets, corslets, breastplates, coats of mail, and the like kinds of armature; also horses and other warlike instruments. The marine ordinances of Louis XIV., 1681, limit contraband to munitions of war. So, also, the treaties between England and Sweden in 1656, 1661, 1664, and 1665. Bynkershoek refers to other treaties of the seventeenth century, as containing the same limitation. But Valin says that in the treaty of commerce between France and Denmark, in 1742, pitch, tar, resin, sail cloth, hemp, cordage, masts, and ship timber were declared to be contraband. By the treaty of Utrecht, in 1713, and the subsequent treaties of 1748, 1763, 1783, and 1786, between Great Britain nd France, contraband was strictly confined to munitions of war; all other goods not worked into the form of any instrument or furniture for warlike use, by land or sea, are expressly excluded from this list. But the contraband character of naval stores continued a vexed question between Great Britain and the Baltic powers. By the treaty of 1801, between Great Britain and Russia, to which Denmark and Sweden subsequently acceded, saltpetre, sulphur, saddles and bridles, were enumerated as contraband; and by the convention of July 25, 1803, the list was augmented by the addition of coined money, horses, equipments for cavalry, and all manufactured articles serving immediately for the equipment of ships of war. In the treaty of 1794, between great Britain and the United States, it was stipulated (article 18) that under the denomination of contraband should be comprised all arms

[1] Particular relaxations, or special articles of treaty, may protect certain contraband; thus, in 1802, hemp, the produce of Russia and the property of a Russian merchant, taken on its way to Amsterdam, was not confiscated by the British Court of Admiralty; it was not on board a Russian ship, but was taken in the vessel of another country. It was, however liable to seizure and pre-emption. (The 'Apollo,' 4 *Rob.*, 158.)

and implements serving for the purposes of war, 'and also timber for ship-building, tar or rosin, copper in sheets, sails, hemp and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted.' The article then goes on to provide, that '*whereas the difficulty of agreeing on the precise cases, in which alone provisions and other articles, not generally contraband, may be regarded as such,* renders it expedient to provide against the inconveniences and misunderstandings which might thence arise, it is further agreed that whenever any such articles, *so becoming contraband, according to the existing law of nations,* shall, for that reason, be seized,' &c., the owners thereof shall be paid their value, &c.[1]

Of those of more recent date

§ 17. The numerous treaties to which the United States have been parties, and which contain any stipulations respecting contraband, with the single exception of the one just referred to with England, in 1794, confine the term to arms and munitions of war, and in the early ones naval stores are, in express terms, excluded from the list. The more modern treaties between European powers are not calculated to throw much light upon this subject. The declarations of the French and English governments, at the commencement of the war with Russia, in 1854, except *contraband of war* from the articles to which impunity is accorded, but they contain no new definition of contraband. But the British Order in Council of February 18, 1854, issued in anticipation of the declaration of war, prohibited from being exported, or carried coastwise, 'all arms, ammunition and gunpowder, military and naval stores, and the following articles, being articles which are judged capable of being converted into, or made useful in increasing the quantity of military or naval stores, that is to say, marine engines, screw propellers, paddle wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, fire bars, and every article or any other component part of an engine or boiler, or any article whatever which is, or can, or may become applicable for the manufacture of marine machinery.' Although this Order,

[1] Merlin, *Répertoire*, verb. 'Prise Maritime,' § 3, art. 1; Pistoye et Duverdy, *Traité des Prises*, tit. vi. ch. ii. § 3. And see the attempt made by John Burrough to trade with Sweden expressly against the interdiction of the King of Denmark. (*Sir Walter Raleigh*, liv. v. cap. i. § 10.)

and its subsequent modification, were probably not intended as a fresh declaration of contraband of war, yet it was evident from the character of the Order itself, and from answers given by the ministers in the House of Commons, that the parts and elements of steam machinery, and also coals,[1] were to be

[1] After the declaration of war in 1870 between France and Germany, the British Government lost no time in announcing the determination of Great Britain to maintain a position of neutrality between the contending parties; but Germany appeared to wish that Great Britain should go further, and that she should not only enjoin upon British subjects the obligations of neutrality, but that she should take it upon herself to enforce those obligations in a manner and to an extent wholly unusual. Germany complained that England had provisioned the French fleet with coal by direct communication of English vessels with the fleet, that there was an export of horses in large quantities to France, and that contracts had been entered into with English houses at Birmingham to supply the French Government with cartridges. Germany absolutely wished that England should not only forbid, but should also prevent the exportation of articles contraband of war; that is to say, that she should decide herself what articles were to be considered as contraband of war, and that she should keep such a watch upon her ports as to make it impossible for such articles to be exported from them. But even if it be clearly defined that coal is contraband, it is beyond dispute that the contraband character would depend upon the destination; the neutral power could hardly be called upon to prevent the exportation of such cargo to a neutral port, and if this be the case, how could it be decided at the time of departure of a vessel, whether the alleged neutral destination were real or colourable? The question of the destination of the cargo must be decided in the prize court of a belligerent, and Germany could hardly seriously purpose to hold the British Government responsible, whenever a British ship, carrying a contraband cargo, should be captured while attempting to enter a French port. It appears from the *Journal Officiel* of July 26, 1870, that the French Government did not consider coal to be contraband of war.

The best opinions on this subject seem to agree that the quantity and the destination of coal may render it liable to seizure. In such case it is obviously for the prize court of the captor to decide the question of *contraband*. See the *Jurist*, 1859, vol. v. part ii. p. 203. The determination of what is contraband must depend on the circumstances of each particular cargo. Provisions, though they may be safety sent under other circumstances, yet if sent to a port where an army of a State at war is in want of food, may become contraband. So with regard to coals. They may be sent for the purpose of manufacture, but if sent to a port where there are war steamers, with the view of supplying them with coals, then they become contraband. See *Parliamentary Debates, H. of L.*, May 16, 1861. By parity of reasoning the same remarks apply to horses. They are, moreover, mentioned as contraband in many treaties between different States, Russia always excepted. A neutral vessel destined to be sent to the enemy and to be used for purposes of war is contraband. (The 'Richmond,' 5 *Rob*, 325.)

When Prussia was in the same position as that in which Great Britain found herself in 1870, her line of conduct was similar, and she found herself equally unable to enforce upon her subjects stringent obligations against the exportation even of unquestionable munitions of war. During the Crimean war arms and munitions were freely exported from

regarded as articles *ancipitis usûs*, not necessarily contraband, but liable to be considered so, if they were to be applied to the military or naval uses of the enemy. Now, by virtue of the 42 and 43 Vict., c. 21, § 8 (1879), the following goods may, by Proclamation or Order in Council, be prohibited either to be exported or carried coastwise: arms, ammunition, and gunpowder, military and naval stores, and any articles which her Majesty shall judge capable of being converted into or made useful in increasing the quantity of military or naval stores, provisions, or any sort of victual which may be used as food by man; and if any goods so prohibited shall be exported or brought to any quay or other place to be shipped for exportation from the United Kingdom, or carried coastwise, or to be water-borne to be so exported or carried, they shall be forfeited, and the exporter or his agent or the shipper of any such goods shall be liable to the penalty of 100*l.* A Swedish ordinance, of April 8, 1854, section 5, enumerates as contraband of war all kinds of arms, munitions of war, military stores, saddles, bridles, and other manufactured articles, immediately applicable to warlike purposes.

In 1877 Russia declared the following articles to be contraband: small arms and artillery, mounted or in detached pieces; ammunition for fire-arms, such as projectiles, fuses for shells, balls, priming cartridges, cartridge cases, powder, saltpetre, sulphur, explosive materials and ammunition, such as mines, torpedoes, dynamite, pyroxyline, and other fulminating substances; artillery engineering and transport materials, such as gun carriages, caissons, cartridge boxes, campaigning forges; canteens, pontoons, &c.; articles of military equipment and

Prussia to Russia, and arms of Belgian manufacture found their way to the same quarter through Prussian territory, in spite of a decree issued by the Prussian Government, prohibiting the transport of arms coming from foreign States. It may not be irrelevant to quote the views expressed, in 1870, to a foreign Minister at Washington by the Secretary of State of the United States, respecting the duties of neutrals in regard to trade in articles contraband of war. He is reported to have said that arms and ammunition had always been considered to be articles of legitimate commerce by neutrals during war, and that the United States claimed the right to supply them to all belligerents without distinction, adding that during the Civil War in America quantities of these articles had been brought from England, France, and Belgium. The Belgian Government, while prohibiting the transit and exportation of arms and munitions of war in 1870, nevertheless excepted from that prohibition articles which could clearly be shown to be destined for a neutral Government, and reserved formally the right of free exportation for the future.

attiré, such as pouches, cartridge boxes, bags, cuirasses, sappers' tools, drums, saddles and harness, articles of military dress, tents, &c., and generally everything destined for military or naval forces. The same to be liable to seizure and confiscation, save so much of them as might be for the use of the ship in which they were conveyed.

Decisions of prize courts

§ 18. Again, if we recur to the decisions of prize courts, although we shall find less discordancy, perhaps, than in the other sources of international law, we nevertheless shall encounter a diversity of sentiment, on some points, which it would be vain to attempt to reconcile. Even in the same country, at different periods, the decisions have been various and contradictory. Thus, in England, Sir Leoline Jenkins, the judge of Admiralty in the reign of Charles II., 1674, in the case of a Swedish vessel laden with naval stores, already referred to, decided that such commodities as pitch, tar, and naval stores, except in case of besieged places, ought not to be judged contraband; while Sir William Scott condemned naval stores as contraband, even when bound to a mercantile port only, as 'they may then be applied to immediate use in the equipment of privateers, or may be conveyed from the mercantile to the naval port, and there become subservient to every purpose to which they could have been applied, if going directly to a port of naval equipment.' The same authority sustained the orders and instructions to English cruisers, to seize all neutral vessels laden with corn, flour, meal, and other provisions, bound to ports of France, upon the ground that by the modern law of nations, all provisions are to be considered contraband, and, as such, liable to confiscation, whenever the depriving the enemy of these supplies is one of the means to be employed in reducing him to terms.[1]

There is no positive rule

§ 19. As already stated, it is not our intention to attempt to reconcile conflicting opinions and decisions, or to deduce, from any process of reasoning, the rules of a universal law applicable to contraband of war. But we will endeavour to state what has been decided to be contraband by the prize courts of Europe and of the United States, wherein the courts are generally agreed, and wherein they have differed

[1] *Life and Cor. of Sir L. Jenkins*, supra; the 'Richmond,' 5 *Rob.*, 325.

in opinion. It is, perhaps, of as much importance to know what has been, and is likely to be, administered as the law, in the courts of the principal commercial States, as to know what *ought*, in theory, to be established as the conventional law of nations. The liability to capture can only be determined by the rules of international law, *as interpreted and applied by the tribunals of the belligerent State*, to the operations of whose cruisers the neutral merchant is exposed.

Munitions of war

§ 20. It is universally admitted, that all instruments and munitions of war are to be deemed contraband, and subject to condemnation. This rule embraces, by its terms, and by fair construction, all ordnance and arms of every description, balls, shells, shot, gunpowder, dynamite, and articles of military pyrotechny, gun carriages, ammunition waggons, belts, scabbards, holsters, all military equipments and military clothing. Any vessel, evidently built for warlike purposes, as gun and mortar boats, and destined to be sold for such use, is clearly liable to confiscation under the same rule. To this list are to be added all articles manufactured or unmanufactured, which are almost exclusively used for military purposes, as machinery for manufacturing arms, and saltpetre, and sulphur for making gunpowder.

Manufactured articles

§ 21. It is an established doctrine of the English Admiralty, that all manufactured articles that in their natural state are fitted for military use, or for building and equipping ships of war, such as masts, spars, rudders, wheels, tillers, sails, sail cloth, cordage, rigging, and anchors, are contraband in their own nature, to the same extent as munitions of war, and that no exception is admitted in their favour, unless treated by express provisions of a treaty. Since the introduction of steam, as a motive power, in ships of war, marine engines, screw propellers, cylinders, shafts, boilers, boiler plates, tubes, fire bars, and every component part of a marine engine or boiler, and every article suitable for the manufacture of marine machinery, would be contraband; the same may be said of torpedoes, and all electric gear, connected with them or with artillery.

Unwrought articles

§ 22. Articles in a rough state, which may be used for military or naval purposes, may, or may not, be contraband, according to their nature and destined use, as inferred from

their immediate destination. Thus, pitch, tar, and hemp, destined to the enemy's use, are generally held to be contraband in their nature, but when they are the produce of the neutral country from which they are exported, and are the property of its subjects or citizens, they are exempt from confiscation, except when they are exclusively and immediately destined to warlike use. Ship timber, in a rough state, is not *in se* contraband, but it may become so from its particular character, as masts and spars, or from the character of its port of destination. Copper is not generally contraband, but if in sheets, adapted to the sheathing of vessels, it is condemned. Hemp is more favourably considered than cordage. Rosin is not generally contraband, but is condemned if going to a port of naval equipment. Iron itself is treated with indulgence, but if of such a form as to make it suitable for military or naval purposes, and its immediate destination is for such use, it cannot claim the benefit of exemption; and the same of telegraph cables and insulated wire.[1] This rule would probably be applied to all unwrought materials for ship-building, and for the construction of marine machinery. Since the introduction of steam as the motive power in ships of war, the question has been much discussed in Europe, whether coals are to be considered as contraband. They would seem now to properly belong to the same class as ship timber, tar, pitch, and other unwrought materials for ship-building and naval stores. In the war of 1856, between the Allies and Russia, the English cruisers stopped coals on their way to an enemy's port on the Black Sea, though it appears, from an answer already referred to, given in the House of Commons, by Sir James Graham,[2] that they would be regarded by British cruisers in the same light as hemp, viz. as an article *ancipitis usûs*, not necessarily contraband, but liable to detention under circumstances that warrant suspicion of their being destined to the military or naval uses of the enemy. Ortolan[3] first expressed the opinion that coals might, or might not, according to their intended use, be classed as prohibited articles; but he afterwards corrected this statement, and concluded that they never can, under any circumstances,

[1] The 'International,' *L. R.*, 3 *Adm.*, 321.
[2] May 9, 1845, Handsard's *Debates*, cxxxiii. p. 38.
[3] *Diplomatie de la Mer.*, b. iii. c. 6, t. ii. p. 206.

become contraband of war. This view of the question is ably advocated by Hautefeuille.[1]

Intended use deduced from destination

§ 23. The probable use of articles is inferred from their known destination. This rule seems neither unjust nor unequal. The remarks of Chancellor Kent on this point are exceedingly clear and appropriate. 'The most important distinction,' he says, 'is whether the articles were intended for the ordinary uses of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. The nature and quality of the port to which the articles are going, is not an irrational test. If the port be a general commercial one, it is presumed the articles are intended for civil use, though occasionally a ship of war may be constructed in that port. But, if the great predominant character of that port, like Brest in France, or Portsmouth in England, be that of a port of naval military equipment, it will be presumed that the articles were going for military use, although it is possible that the articles might have been applied to civil consumption. As it is impossible to ascertain the final use of an article *ancipitis usûs*, it is not an injurious rule, which deduces the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if at the time when the articles were going a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful.' The same principle is laid down by Sir William Scott, but it does not seem to have been followed out in all his decisions. It applies equally to unwrought materials and ordinary naval stores. If, when they are destined to a *commercial* port, it is a just presumption that they are intended solely for civil use, it is evident that this presumption exists in all cases when such is their destination, from whatever country they may be exported, and hence, in all such cases, the presumption should be admitted for their protection, as it is for their condemnation when destined to a port of naval equipment. The distinction in favour of those which are the produce of the

[1] *Droit des Gens*, tit. 2, p. 212; Polson, *Law of Nations*, p. 63; the 'Staadt Embden,' 1 *Rob.*, 26; the 'Sarah Christina,' 1 *Rob.*, 241; the 'Maria,' 1 *Rob.*, 372; the 'Apollo,' 4 *Rob.*, 158; the 'Christina Maria,' 4 *Rob.*, 166; the 'Twee Juffrowen,' 4 *Rob.*, 244; the 'Evert,' 4 *Rob.*, 354; the 'Nostra Signora,' 5 *Rob.*, 97; the 'Neptunus,' 3 *Rob.*, 108.

country from which they are imported, does not seem to be well founded.[1]

Provisions

§ 24. It is generally admitted, that provisions (*commeatus belli*) are not, in their own nature, contraband. But while some contend that they never can become so under any circumstances, Great Britain holds (and such is her uniform practice) that they may become liable to condemnation by their special destination and intended use. When they are destined to the immediate supply of the military or naval forces of the enemy, the aid thus intended to be given for the prosecution of the war is so direct and important that the act of transportation is peculiarly noxious, and they are condemned without hesitation; but grain in an unprepared state is regarded more favourably. It would seem, from the decision of the Supreme Court of the United States, in the case of the 'Commercen,' that where the real object is the supply of the enemy's forces, the voyage is illegal, even where the port of destination is neutral in its character. Nor, by the established doctrine of the British Admiralty, is it in all cases necessary, in order to make provisions contraband, that the destination to the use of the enemy's military or naval forces should be certain. The rule of *ancipitis usûs* is here applied, which deduces the final use from the immediate destination. If destined to a general commercial port, they used to be presumed to be for civil use, but if to a port whose predominant character is that of naval construction and equipment, they were presumed to be for military use. But the modern inland communications by railway must tend to qualify this rule; while, on the other hand, a warlike destination alone is not usually sufficient to produce a condemnation. It must further appear that the provisions were, from their nature and quality, adapted to military use; since, otherwise, there would be no basis for the presumption that they would have been applied to that use, had their arrival been permitted. Thus, where cheeses, intercepted as contraband, were destined to Brest, a port notoriously of naval equipment, evidence was required by Sir William Scott of their fitness for naval use.[2]

[1] Kent, *Com. on Am. Law*, vol. i. p. 140; Riquelme, *Derecho Púb. Int.*, lib i. tit. ii. cap. xv.

[2] The 'Commercen,' 2 *Gallis R.*, 264; the 'Jonge Margaretha,' 1

§ 25. The ancient custom of *pre-emption*[1] by the belligerent of the property of the subjects of another State, as practised about the middle of the seventeenth century, had a much wider operation and very different meaning than is now attributed to it; all cargoes, without distinction, were subject to it. By the French Ordonnance of 1584, Art. 69, contraband was subjected, not to *confiscation*, but to *pre-emption*. But, according to the modern use of this term, it is applied to articles not contraband in themselves, but which, being *ambigui usûs*, are, under the peculiar circumstances of the case, subject to seizure and to be condemned to the use of the belligerent, he paying their value with a reasonable mercantile profit—which, by the practice of the British prize courts, is usually fixed at ten per cent. If the goods are contraband by the law of nations the carrying of them is a criminal act, punishable by confiscation, or any milder penalty which the belligerent may see fit to impose. The question, therefore, resolves itself into one of *contraband*, upon which opinions are somewhat divided.[2]

Ancient rule of pre-emption

§ 26. The British Admiralty, and especially Sir William Scott, sustained the capture of provisions which were not even *probably* destined to military use; they did not confiscate them as *contraband*, but condemned them to the use of the British Government, on the payment of a price equivalent to their value, or, rather, their cost, and the specified mercantile profit of ten per cent. A similar rule of *pre-emption*, or requisition, was applied by Great Britain to certain *native commodities* of neutral States, found in neutral vessels, and required by her for naval purposes. In some cases, where

British rule of pre-emption

Rob., 196; the 'Zelden Rust,' 6 *Rob.*, 93; the 'Ranger,' 6 *Rob.*, 126; the 'Edward,' 4 *Rob.*, 68; Maisonnaire *v.* Keating, 2 *Gallis R.*, 334.

[1] The prerogative of Purveyance and Pre-emption upon land was a right enjoyed by the Crown of buying up provisions and other necessaries, by the intervention of the King's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without the consent of the owner; also of forcibly impressing the carriages and horses of the subjects to do the King's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price. This prerogative prevailed pretty generally throughout Europe, during the scarcity of gold and silver and the high nominal valuation of money consequential thereupon. Pre-emption on the sea is akin to the above, and is well explained in the case of the 'Haabet,' 2 *Rob.*, 182.

[2] Phillimore, *On Int. Law*, vol. iii. §§ 267 270; the 'Sarah Christina,' 1 *Rob.*, 241; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 18.

this rule of pre-emption, or right of purchase, was exercised, it was not claimed that the goods so captured and condemned to a forced sale were contraband, or even *ambigui usûs*; but the right to pre-empt them was claimed, because 'the ancient practice of Europe, or at least of several maritime States of Europe, was to confiscate them entirely; a century has not elapsed since this claim has been asserted by some of them.'[1]

Contested by others

§ 27. The arguments adduced in favour of the British right of *pre-emption* failed to convince its opponents of its justness or legality, and its enforcement was, at the time, most strenuously opposed by the Government of the United States and the neutral powers of Europe. Nor did this opposition cease with the war in which the rule had originated, or, at least, been called into operation. Since then text-writers have most emphatically denied the legality of the rule, and attacked the arguments by which it was attempted to be defended. Probably in any future war the British Government will not attempt to exercise the right of pre-emption, except upon goods manifestly contraband of war, or which may fall within section 38 of the Naval Prize Act, 1864 (27 and 28 Vict., c. 25). This Act enacts that 'where a ship of a foreign nation, passing the seas, laden with naval or victualling stores intended to be carried to a port of any enemy of her Majesty, is taken and brought into a port of the United Kingdom, and the purchase for the service of her Majesty of the stores on board the ship appears to the Lords of the Admiralty expedient, without the condemnation thereof in a prize court, in that case the Lords of the Admiralty may purchase on the account or for the service of her Majesty all or any of the stores on board the ship; and the Commissioners of Customs may permit the stores purchased to be entered and landed within any port.'

Insurance on articles contraband of war

§ 28. Arnould lays down the rule that all insurances on articles contraband of war are wholly void, and incapable of being enforced in the courts of the belligerent country.[2] But if effected by or for neutrals, and sought to be enforced in the court of a *neutral* State, the case would be different, for it

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 24; Kent, *Com. on Am. Law*, vol. i. pp. 138, 139; Debrett's *State Papers*, p. 380; Manning, *Law of Nations*, pp. 287, 316.

[2] Gibson *v.* Service, 5 *Taunt.*, 433.

is not deemed unlawful in a neutral, by its own government, to be engaged in a contraband trade.[1] The insurance, therefore, by a neutral, of articles contraband of war, being *per se* a valid contract, may be enforced in the courts of the neutral country, provided the nature of the trade and of the goods was disclosed to the underwriter, or provided there be just ground, from the circumstances of the trade, or otherwise, to presume that he was duly informed thereof. Duer contends that the carrying of contraband, being contrary to the general law of nations, renders the voyage prohibited and illegal, and hence, that an insurance of the ship on such a voyage cannot be sustained. We copy a portion of his remarks. 'An insurance,' he says, 'upon goods liable to confiscation, as contraband of war, if made in the belligerent country whose rights are violated, it is admitted by all writers, is wholly void; nor do I perceive any reason for doubting that an insurance upon every other subject or interest, liable to be involved in the same penalty, is equally invalid. Hence, a policy upon the freight of the contraband articles, upon other goods, the property of the same owner, and upon the ship, when subject to condemnation, is, in all cases, an illegal contract; for, although the penalty in which the subject is liable may not always be enforced in a court of Admiralty, that court alone seems competent to judge of the special circumstances that may warrant a discretionary relaxation of its general rules. Nor to avoid a policy upon the ship, does it seem to be necessary that she should be placed in circumstances to justify her condemnation.' The transportation of contraband, as viewed by the law of nations, is universally an unlawful act; and it is for this reason that it subjects the ship to the penalty of the loss of freight. The imposition of this penalty, it seems to me, renders the voyage prohibited and illegal; and hence, if we are governed by analogy, an insurance of the ship, on such a voyage, cannot be sustained. The arguments of a sound policy lead us to the same conclusion. It is impossible to deny that a belligerent country has a real, and, in some cases, a deep interest in preventing the transportation of contraband articles to the use of the enemy. To permit the vehicle of transportation to be insured, is to encourage the

[1] The 'Santissima Trinidad,' 7 *Wheat.*, 283; *ex parte* Chavasse, *in re* Grazebrooke, 34 *L. J.* (Chanc.), 17.

act. These reasons do not apply to an insurance upon the innocent goods of an innocent shipper, which is, doubtless, valid. He was no party to the illegal transaction, had no power to prevent it, and, it must be presumed, had no knowledge of its existence. It is, however, doubtful whether the insurer is liable even to the owner of innocent goods for a loss arising from condemnation or detention, by his own government, of the carrier ship.' These views are contested by some of the Continental publicists.[1]

The carriage by a neutral of despatches, or of persons in the naval or military service of a belligerent, will be discussed in chapter xxviii., §§ 17 and 18.

[1] Arnould, *On Insurance*, vol. i. p. 740; Duer, *On Insurance*, vol. i. pp. 642, 643; Bedarride, *Droit Maritime*, § 1095 et seq.

The English law seems to have omitted to enact that contraband must be specified in the policy of insurance. But the assurer would not be liable unless aware of the risk. According to the French law, contraband of war must be specially and specifically described in the policy of insurance, unless the assured be ignorant of the nature of the goods. (*Ord. de la Marine*, liv. iii. t. vi. art. 31.)

Although it is not a breach of neutrality to carry enemy's goods, not contraband, from a neutral to an enemy's country, no insurance can be effected in the belligerent country; but query whether since the Declaration of Paris, 1856, such an insurance might not be valid.

CHAPTER XXVII

RIGHT OF VISITATION AND SEARCH

1. General exemption of merchant vessels on the high seas—2. Right of search a belligerent right—3. British claim of a right of visit in time of peace—4. Denied by the United States—5. Opinions of American publicists—6. Of Continental writers—7. Of Lord Stowell—8. Distinction between pirates and slavers—9. Great Britain finally renounces her claim of right of visit—10. Visit and search in time of war—11. English views as to extent of this right—12. Views of American writers—13. Limitations imposed by Continental publicists—14. Force may be used in the exercise of this right—15. But must be exercised in a lawful manner—16. Penalty for contravention of this right—17. English decision as to effect of convoy—18. Ships of war exempt from search—19. Merchant ships under their convoy—20. Treaties respecting neutral convoy—21. Opinions of publicists—22. Neutral vessels under enemy's convoy—23. Resistance of master on cargo—24. Neutral property in armed enemy vessel—25. Documents requisite to prove neutral character—26. Concealment of papers—27. Spoliation of papers—28. Use of false papers—29. Impressment of seamen from neutral vessels—30. American rule as defined by Webster.

General exemption of merchant vessels on the high seas

§ 1. IT has been stated in chapter vii. that every merchant vessel on the high seas is regarded, in international law, as a part of the territory of the State to which it belongs. To enter into such vessel, or to interrupt its course, by a foreign power in time of peace, or (it being neutral) by a belligerent in time of war, is an act of force, and is, *primâ facie*, a wrong, a trespass, which can be justified only when done for some purpose, allowed to form a sufficient justification by the law of nations. The right of a vessel of one State to visit and search a vessel of another State on the high seas, in any case, is therefore an exception to the general rights of property, jurisdiction, equality, and independence of sovereign States; to justify such an act it must be shown that the particular case comes clearly within the exceptions to this rule, which have been established by the positive law of nations, or by treaty stipulations between the parties.[1]

[1] Webster, *Dip. and Off. Papers*, p. 143; Wildman, *Int. Law*, vol. ii. p. 40; Lawrence, *Visitation and Search*, p. 4; Hubner, *Saisie de Bâti-*

Right of search a belligerent right

§ 2. The right of *search* upon the high seas is now universally regarded as a belligerent right which cannot be exercised in time of peace, except when it has been conceded by treaty or where there is suspicion of piracy or crime. Whatever difference of opinion may formerly have existed on this point, this right of search in time of peace has been disclaimed by the British Government—the only maritime power which was supposed to advocate it as a principle of the law of nations. This general rule with respect to vessels on the high seas does not, of course, apply to the execution of revenue laws or other municipal regulations in the ports and bays, or within one marine league of the coast.[1]

Claim of England to visit in time of peace

§ 3. The British Government at one time attempted to draw a distinction between the right of *visit* and the right of *search*, and while it distinctly disavowed any claim to exercise the latter in time of peace, it insisted upon the right of visit for the purpose of ascertaining whether a merchant vessel is justly entitled to the protection of the flag which she may happen to have hoisted, such vessel being in circumstances which render her liable to suspicion; the right 'to know whether the vessel pretending to be American, and hoisting the American flag, be *bonâ fide* American;' and yet, says Lord Aberdeen, 'if, in the exercise of this right, either from involuntary error, or in spite of every precaution, loss or injury should be sustained, a prompt reparation would be afforded.'[2]

ments, pt. ii. ch. iii.; Kluber, *Droit des Gens Mod.*, § 293, *a*; Jouffroy, *Droit Maritime*, p. 213; Heffter, *Droit Int.*, § 167; Hautefeuille, *Des Nations Neutres*, tit. xi. ch. i.; the 'Antelope,' 10 *Wheat. R.*, 66.

[1] Ortolan, *Dip. de la Mer*, tome ii. ch. vii.; *Lord Aberdeen to Mr. Everett*, December 20, 1841.

[2] Phillimore, *On Int. Law*, vol. iii. § 326; Riquelme, *Derecho Pub. Int.*, lib. i. tit. ii. cap. vii.; *British and Foreign State Papers*, vol. xxx. p. 1165.

But maritime States have always claimed a right of visitation and enquiry, within those parts of the ocean adjoining to their shores, which the common courtesy of nations has, for their common convenience, allowed to be considered as parts of their dominions for various domestic purposes; this has nothing in common with a right of visitation and search upon the unappropriated parts of the ocean in time of peace. (And see 'Le Louis,' 2 *Dods.*, 246.)

Extract from the 'Black Book of the Admiralty,' No. B, 8:—'Item, if any of our ships or vessels do meet upon the sea or in ports any other vessels, which do make any resistance or defence against those of our ships or vessels, then it is lawful for our men to assail the other as

§ 4. 'The Government of the United States, on the other hand,' said Mr. Webster, 'maintains that there is no such well-known and acknowledged, nor, indeed, any broad and generic difference between what has been usually called *visit*, and what has been usually called *search*; that the right to visit, to be effectual, must come, in the end, to include search.' He thus describes the views of the United States on the means which a vessel of war may use in time of peace, to ascertain the character of any other vessel on the high seas:—'As we understand the general and settled rules of public law, in respect to ships of war sailing under the authority of their

Claim denied by the United States

enemies, and by force to seize and bring them before the Admiral, entirely as they have taken them, without pillaging or indamaging them, and there to receive what the law and custom of the sea wills and requires.' Sir Travers Twiss, in a note to this paragraph, says that the law and custom on this point are set forth in a letter from Edward III. to Peter, King of Aragon.

An Ordinance of Parliament, November 1643, enabling certain persons to set forth ships for the guarding of the seas, directs that, if such persons or any ships by them employed shall happen, upon the seas or in any harbour or creek, to meet with any ships that shall not willingly yield themselves to be visited, but shall make resistance by force and violence, then they shall by all means possibly and with all force compel them to yield and submit themselves to reason and justice, although it doth fall out that, by fighting with them, one or more of them be maimed, hurt, or slain in the resistance.

A court martial was held in August 1812, in the Downs, on the Hon. Henry Blackwood, commander of his Majesty's ship 'Warspite,' upon a charge of having caused the death of a master of a merchant schooner in the Mediterranean, by ordering several guns to be fired into her. The merchant vessel had not obeyed the usual means taken to bring her to, but persisted in her course and made more sail. Captain Blackwood, considering it imperious on him to ascertain that she was not a privateer (for he knew that several were near), went in chase and fired at her, when, unfortunately, the master was killed. The mate of the schooner represented the circumstances to the Admiralty, and the court martial was accordingly held. No person belonging to the schooner appeared to substantiate the charge of murder, although they had received notice of the trial. The court martial not only acquitted Captain Blackwood, but adjudged his conduct to have been strictly correct, and that he could not have acted otherwise. (*Ann. Reg.*, 1812, p. 110.)

In 1838 the British packet 'Express,' on her way from Vera Cruz to Sacrificios, was stopped by a French ship of war, and her pilot taken on board the French ship. The French Government apologised for the occurrence, stating that the officer who had given the order was not aware that the packet was an English vessel. (*Parl. Papers* of 1839.)

In 1855 the 'El Dorado,' a United States mail vessel, was stopped upon the high seas by a Spanish frigate, and was boarded by a Spanish officer and required to produce papers. It appeared that the cruiser was only ordered to visit or search foreign vessels when within the maritime jurisdiction of Spain. The apology was considered to be 'technically satisfactory' by the United States Government.

Government, "to arrest pirates and other public offenders," there is no reason why they may not approach any vessel descried at sea, for the purpose of ascertaining its real character. Such a right of approach seems indispensable for the fair and discreet exercise of their authority; and the use of it cannot be justly deemed indicative of any design to insult or injure those they approach, or to impede them in their lawful commerce. On the other hand, it is clear that no ship is, under such circumstances, bound to lie by, or wait the approach of any other ship. She is at full liberty to pursue her voyage, in her own way, and to use all necessary precautions to avoid any suspected sinister enterprise or hostile attack. Her right to the free use of the ocean is as perfect as that of any other ship. An entire equality is presumed to exist. She has a right to consult her own safety, but, at the same time, she must take care not to violate the rights of others. She may use any precautions dictated by the prudence or fears of her officers, either as to delay, or the progress or course of her voyage, but she is not at liberty to inflict injuries upon other innocent parties, simply because of her conjectural dangers. But if the vessel thus approached attempts to avoid the vessel approaching, or does not comply with her commander's order to send him her papers for his inspection, nor consent to be visited or detained, what is next to be done? Is force to be used? And if force be used, may that force be lawfully repelled? . . . Suppose that force be met by force, gun returned for gun, and the commander of the cruiser, or one of his seamen, be killed, what description of offence will have been committed? It may be said, in behalf of the commander of the cruiser, that he mistook the vessel for a vessel of England, Brazil, or Portugal; but does this mistake of his take away from the American vessel the right of self-defence? The writers of authority declare it to be a principle of natural law, that the principle of self-defence exists against an assailant who mistakes the object of his attack for another whom he had the right to assail.' He also discussed the consequences of admitting the claim as a matter of *right*, for, if a *right*, it had its correlative *duties*.[1]

[1] Webster, *Dip. and Off. Papers*, pp. 164, 165, 166, 167; Webster, *Works*, vol. vi. pp. 335, 336, 338, 339; Bello, *Derecho Internacional*, pt. ii. cap. viii. § 10; Wheaton, *Hist. Law of Nations*, pp. 706 et seq.

§ 5. Kent says most emphatically that the right of visitation and search 'is strictly and exclusively a war right, and does not rightfully exist in time of peace, unless conceded by treaty.' He, however, concedes the *right of approach* for the sole purpose of ascertaining the real national character of the vessel sailing under suspicious circumstances. 'The distinction,' says Wheaton, now set up, between a right of *visitation* and a right of *search* is nowhere alluded to by any public jurist, as being founded on the law of nations. The technical term of *visitation and search*, used by the English civilians, is exactly synonymous with the *droit de visite* of the Continental civilians. The right of seizure for a breach of the revenue laws, or laws of trade and navigation, of a particular nation is quite different. The utmost length to which the exercise of this right on the high seas has ever been carried, in respect to the vessels of another nation, has been to justify seizing them within the territorial jurisdiction of the State against whose laws they offend, *and* pursuing them, in case of flight, seizing them upon the ocean, and bringing them in for adjudication before the tribunals of that State. This, however, says the Supreme Court of the United States, in the case of the "Marianna Flora," has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified.' Mr. Justice Story, delivering the opinion of the Supreme Court, in the case of the 'Marianna Flora,' says that the right of visitation and search does not belong, in time of peace, to the public ships of any nation. 'This right is strictly a belligerent right, allowed by the general consent of nations in time of war, and limited to those occasions. Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all, and no one can vindicate to himself a superior exclusive prerogative there. Every ship sails there with the unquestionable right of pursuing her own lawful business without interruption.' He also says; 'It has been argued that no ship has a right to approach another at sea, and that every ship has a right to draw round her a line of jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach.'

Views of the United States sustained by American publicists

This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations within cannon-shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent appropriation, and has never been successively asserted beyond it. Every vessel undoubtedly has a right to the use of so much of the ocean as she occupies, and is essential to her own movements. Beyond this, no exclusive right has ever yet been recognised, and we see no reason for admitting its existence. Merchant ships are in the constant habit of approaching each other on the ocean, either to relieve their own distress, to procure information, or to ascertain the character of strangers; and hitherto there has never been supposed in such conduct any breach of the customary observances, or of the strictest principles of the Law of Nations.'[1]

By Continental writers

§ 6. The older Continental publicists discuss the general question of *search* under the terms *visit* and *visitation*, as a belligerent right. Several, however, who have written since Wheaton made the statement above alluded to, have discussed the claim of Great Britain to the right of *visit* in time of peace, as distinguished from the general right of *visitation* and *search* in time of war. We refer particularly to the able works of Massé, Ortolan, Hautefeuille, and Pistoye et Duverdy. Massé says: 'Whatever may be the object of visit in time of peace, it is always an act of police which cannot be exercised by one nation over another, for this act would imply, on the part of the visitor, a sovereignty incompatible with the reciprocal independence of nations (*peuples*).' Ortolan distinguishes the right of ships of war to ascertain the nationality of a merchantman (*droit d'enquête du pavillon*), from the right of visitation or search (*droit de visite ou de recherche*). He thinks that signals, or exchange of words, suffice with respect to the nationality of the flag, except on suspicion of piracy, when all further proceedings must be taken at the risk of the man-of-war. He, however, omits all consideration of vessels committing crimes against municipal

[1] Kent, *Com. on Am. Law*, vol. i. p. 153; Wheaton, *Elem. Int. Law*, Introduction, by Lawrence, p. cxxiv; the 'Marianna Flora,' 11 *Wheat. R.*, 42.

law in territorial waters and of vessels having hostile intent in time of peace.[1] He unites with Wheaton in declaring that the right of visitation or search does not exist except in time of war. He says that if accorded for time of peace, by special conventions between particular States, such treaty stipulations do not bind those who are not parties to them, nor do they make it a part of the law of nations. Hautefeuille discusses the British claim at great length. He agrees with Ortolan with respect to the right of ships of war to ascertain the nationality of a merchantman by approaching her, and requiring her to hoist her flag. But beyond this simple fact of showing colours, he denies any *droit d'enquête* in time of peace, except in the case of suspected piracy, which in modern times very rarely occurs. Even then the visiting vessel proceeds at her peril, for if her suspicions are not verified, she becomes guilty of an illegal act toward the vessel visited. All three of these writers oppose the policy of granting this right in time of peace by treaty as a measure most dangerous to maritime commerce; Hautefeuille and Ortolan do not hesitate to declare that such treaties are not in general binding even upon the subjects of the States making them, for the reason that they are virtually a surrender of sovereignty. Pistoye et Duverdy regard the right of reciprocal visit (*droit de visite réciproque*) in time of peace, for the suppression of the slave trade, as one which results only from special convention or treaty.[2]

Of Lord Stowell

§ 7. Lord Stowell, than whom no greater authority can be found in British maritime jurisprudence, says: 'I can find no authority that gives a right to the interruption of the navigation of the vessels of States in amity upon the high seas excepting that which the rights of war give to both belligerents against neutrals. . . . No one can exercise the right of visitation and search upon the high seas, except a

[1] See the 'Virginius,' *ante*, vol. i. p. 449.

[2] Ortolan, *Diplomatie de la Mer*, liv. iii. ch. ii. § 15; Hautefeuille, *Des Nations Neutres*, tit. xi. ch. ii.; Pistoye et Duverdy, *Des Prises*, tit. i. ch. iii.; Massé, *Droit Commercial*, liv. ii. tit. i. c. ii. § 2. Pistoye et Duverdy refer to the treaties between France and England of November 30, 1831, March 22, 1833, May 20, 1845; the convention between France and Sweden, and Norway, May 21, 1833; the treaty between France and Sardinia, December 8, 1834; between France and the Two Sicilies, February 14, 1838; France and Tuscany, November 27, 1837; and the convention between France and Hayti, August 9, 1840.

belligerent power. No such right has ever been claimed, nor can it be exercised without the suppression, interruption and the endangering of the relations with and the lawful navigation of other countries. If the right were to exist at all, it must be universal and extend equally to all countries. If I felt it necessary to press the consideration further, it would be by stating the gigantic mischiefs which such a claim is likely to produce.' And, again: 'All nations being equal, all have an equal right to the uninterrupted use of the ocean for their navigation. In places where no legal authority exists, where the subjects of all States meet upon the footing of entire equality and independence, no one State nor any of its subjects have a right to assume or to exercise any authority over the subjects of another.' The late Sir Robert Phillimore has attempted to sustain the views of Lord Aberdeen, and has argued the question at considerable length. He says: 'It is quite true that the right of *visit and search* is strictly a belligerent right. But the right of visit in time of peace for the *purpose of ascertaining the nationality of a vessel* is a part, indeed, but a very small part, of the belligerent right of visit and search.' He then quotes the words of Bynkershoek, 'Velim animadvertas, eatenus utique licitum esse amicam navem sistere, ut non ex fallaci forte aplustri, sed ex ipsis instrumentis in navi repertis constet, navem amicam esse,' and adds, 'Surely this reasoning applies to the right of ascertaining the national character of a suspected pirate in time of peace; and it may be added, that it appears to have been so considered by no less a jurist than Mr. Chancellor Kent.' The reference, however, is not made by Kent, but by an annotator, since his death. The text of Kent's commentaries, which remains unchanged, declares that 'it (the right of visitation and search) is founded upon necessity, and is strictly a war right, and does not rightfully exist in time of peace, unless conceded by treaty.' [1]

Distinction between pirates and slavers

§ 8. The remark of Sir R. Phillimore, that the objection by the United States to the right to visit and search a suspected slaver bearing the American flag, applies equally to the suspected pirate sailing under the same flag, is fully

[1] The 'Louis,' 2 *Dods. R.*, 210; Phillimore, *On Int. Law*, vol. iii. §§ 322–326; Kent, *Com. on Am. Law*, vol. i. p. 153; Coxe, *Brief Examinations*, p. 26; Lawrence, *On Visitation and Search*, pp. 79–103; the 'San Juan Nepocumeno,' 1 *Hagg. R.*, 265.

answered by the American Government, which admits the right to visit and search any vessel 'reasonably suspected' of being engaged in piracy. The distinction is pointed out in President Tyler's special message of February 27, 1843, as follows: 'The attempt to justify such a pretension [i.e. the right of visit for the purpose of suppressing the slave trade] from the right to visit and detain ships upon reasonable suspicion of piracy, would deservedly be exposed to universal condemnation; since it would be an attempt to convert an established rule of maritime law, incorporated as a principle into the international code by the consent of all nations, into a rule and principle adopted by a single nation, and enforced only by its assumed authority. To seize and detain a ship upon suspicion of piracy, with probable cause, and in good faith, affords no just ground either for complaint on the part of the nation whose flag she bears, or claim of indemnity on the part of the owner. The universal law sanctions and the common good requires the existence of such a rule. The right under such circumstances, not only to visit and detain, but to search a ship, is a perfect right, and involves neither responsibility nor indemnity. But, with this single exception, no nation has, in time of peace, any authority to detain the ships of another upon the high seas, on any pretext whatever, beyond the limits of the territorial jurisdiction.' The argument of President Tyler, it will be seen, is founded on the fact that the slave trade admittedly not being piracy by the law of nations, cannot be held to carry with it the same liabilities attached to the latter. The pirate, as an enemy of the human race, may, by the common law of the world, be seized and disposed of by whomsoever taken. Lawful commerce demands the extinction and suppression of maritime depredation; and hence, in consideration of this desirable end, President Tyler held that 'to seize and detain a ship upon suspicion of piracy, with probable cause and in good faith,' affords no just ground for any reclamations in the premises. If, then, the slave trade is placed in the same category with the crime of piracy, why should it not be subject to the same liabilities? For the reason assigned by President Tyler, in common with the consenting voice, not only of American statesmen, but of distinguished European publicists, that such an admission would involve the

theoretical right of any maritime power, at its pleasure, to interpolate its municipal statutes into the law of nations. The slave trade is *not* piracy by the common law of the world, and therefore cannot be treated as piracy on the high seas, where the sanctions of international law can alone assert their right to universal recognition. The British man-of-war which detains an American vessel on suspicion of piracy is acting, according to President Tyler's view, within the scope of public law ; but to assert the same right as equally applicable to the suppression of the slave trade is to found, on a municipal statute, a claim which is derivable only from the common consent of all civilised nations. It would be giving an extra-territorial effect to a municipal law, and would be a recognition of the right once claimed by Great Britain to impress her seamen from American vessels. It has been decided by the courts both of England and America, that the slave trade is not contrary to the law of nations.[1]

Final settlement of British claims with regard to the slave trade

§ 9. This discussion between the Governments of Great Britain and the United States, or, more properly speaking, between Lord Aberdeen and Mr. Webster, arose out of the claims of British cruisers on the coast of Africa to visit American vessels suspected of being engaged in the slave trade. Neither party would admit the correctness of the rule of international law contended for by the other, but the difficulty in the particular case was amicably arranged by an agreement that each Government should maintain a specified naval force on the coast of Africa to prevent the fraudulent use of their respective flags. Such was the position of this question until 1858, when the operations of British cruisers in visiting American vessels, in the Gulf of Mexico, suspected of being engaged in the slave trade, brought about a direct issue between the two Governments. The United States regarded such visits as a violation of their flags, and protested against the acts of these cruisers. Before acting upon this direct issue the British Ministry referred the question to the law officers of the Crown, and the answer to this reference was, as predicted by Mr. Webster and Mr. Wheaton, that no

[1] Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. viii. ; the 'Antelope,' 10 *Wheat. R.*, 66 ; the 'Diana,' 1 *Dods R.*, 95 ; and see vol. i. p. 254.

authority could be found to support the allegations of Lord Aberdeen; and the right of visit in time of peace, as distinguished from the belligerent right of visitation and search, was then distinctly and unequivocally disavowed by the British Government. On July 26, 1858, Lord Lyndhurst in his speech in the House of Lords said: 'What right has one nation to interfere with another, when their rights on the high seas are coequal? What right has one nation to interrupt or to interfere with the navigation of another nation? Why, the principle is so clear and so distinct that it will not admit of the smallest doubt.' . . . 'Having stated this principle, the next question which arises is this: How are those difficulties to be met which arise out of frauds practised on the high seas? It may be said that the flag of America may be assumed by another power to cover the basest of purposes. But how can that affect the right? How can the conduct of a third power affect any right existing on the part of the United States? By our treaty with Spain we have, no doubt, the right to visit and search Spanish vessels with the view to the suppression of the slave trade. But how can the treaty between Spain and us affect the rights of America? Why, common reason is decisive on the subject. Well, but what other course can we take? I say that the course is quite clear and plain. If one of our cruisers sees a vessel with the American flag, and has reason to believe it is assumed, he must examine and inquire into the facts as well as he can. If he ascertains, to the best of his judgment, that the vessel has no right to use the American flag, he may certainly visit and examine her papers, and if he finds his suspicions correct, he may deal with the vessel in a manner justified by the particular relation existing between England and that country to which the vessel belongs. America, in such a case, would have no right to interfere. The matter would simply be one between an English cruiser and the particular vessel seized. But, on the other hand, if it should turn out that the vessel after all was an American one, that was perfectly justified in using the flag suspected, our situation is this, that we should immediately apologise for the act that was committed, and make the most ample reparation for the injury that was committed.' The foregoing remarks of Lord Lyndhurst were adopted by the British

Minister of Foreign Affairs as expressive of the opinions of his Government.[1]

In the same year, after considerable correspondence between the British, French, and United States Governments, a code of instructions was agreed upon. This was issued, with immaterial variation, to the cruisers or vessels of war of those countries, and may be said to express the view of those countries on the subject.[2] Whilst the correspondence on this

[1] Lawrence, *On Visitation and Search*, pp. 181 et seq.; *Monthly Law Reporter*, vol. xxi. p. 265; *London Times*, July 27, 1858; *Revue des Deux Mondes*, July 1, 1858.

In the message of the President of the United States in 1858, it was stated as unanimously resolved, that 'American vessels on the high seas in time of peace, bearing the American flag, remain under jurisdiction of the country to which they belong, and, therefore, any visitation, molestation, or detention of such vessels by force or by the exhibition of force on the part of a foreign power, is in derogation of the sovereignty of the United States.'

[2] The Instructions are as follows:—

'1. The treaty with France for the suppression of the slave trade having been abrogated, I am commanded by my Lords Commissioners of the Admiralty to acquaint you that, under an arrangement which has been adopted provisionally between the British and French Governments, their lordships desire that all commanding officers of her Majesty's ships will strictly attend to the following regulations with regard to visiting merchant vessels suspected of fraudulently assuming the French flag.

'2. In virtue of the immunity of national flags, no merchant vessel navigating the high seas is subject to any foreign jurisdiction. A vessel of war cannot therefore visit, detain, arrest, or seize, except under treaty, any merchant vessel not recognised as belonging to her own nation.

'3. The colours of a vessel being *primâ facie* the distinctive mark of her nationality, and consequently of the jurisdiction to which she is subject, it is natural that a merchant vessel on the high seas, on finding herself in presence of a ship of war, should hoist her national flag in declaration of her nationality. So soon as the ship of war has made herself known by the display of her own colours, the merchant vessel should, accordingly, hoist her proper national flag.

'4. Should the merchant vessel refuse to do so, it is admitted by both Governments that a warning may be given to her, first by firing a blank gun, and should that be without effect, it may be enforced by a second gun, shotted, but pointed in such a manner as to ensure that she is not struck by the shot.

'5. Immediately that the colours are hoisted, and that the merchant vessel has in this manner announced her nationality, the foreign vessel of war can no longer pretend to exercise a control over her. At most, in certain cases, she may claim the right to speak with her, and demand answers to questions addressed to her by a speaking-trumpet or otherwise, but without obliging her to alter her course. When, however, the presumption of nationality resulting from the colours which may have been shown by a merchant vessel may be seriously thrown in doubt, or be questionable from positive information, or from indications of a nature to create a belief that the vessel does not belong to the nation whose colours she has assumed, the foreign vessel of war may have recourse to the verification of her assumed nationality.

subject was pending the United States Government, without distinctly recognising the right of a vessel of war to compel a merchant vessel to display colours, declared that the simple fact of refusing to exhibit colours was so high a ground of suspicion that it might seem to sanction boarding and further inquiry, and that even if such inquiry were not justified by the result the Government of the United States would not demand redress for an act of visit executed under such circumstances. The question may now be considered as finally settled.

By the Treaty of Washington, signed April 7, 1862, between Great Britain and the United States, it was agreed that those ships of the respective navies of the two nations

'6. A boat may be detached for this purpose towards the suspected vessel, after having first hailed her to give notice of the intention. The verification will consist in an examination of the papers establishing the nationality of the vessel; nothing can be claimed beyond the exhibition of these documents.

'7. To inquire into the nature of the cargo, or the commercial operations of the vessel, or any other fact, in short, than that of the nationality of the vessel, is prohibited. Every other search, and every inspection whatever, is absolutely forbidden.

'8. The officer in charge of the verification should proceed with the greatest discretion, and with every possible consideration and care, and should quit the vessel immediately that the verification has been effected, and should offer to note on the ship's papers the circumstances of the verification, and the reasons which have led to it.

'9. Except in the case of legitimate suspicion of fraud, it should never otherwise be necessary for the commander of a foreign ship of war to go on board, or to send on board a merchant vessel. Apart from the colours shown, the indications are numerous which should be sufficient to satisfy seamen of the nationality of a vessel.

'10. In every case it is to be clearly understood that the captain of a ship of war, who determines to board a merchant vessel, must do so at his own risk and peril, and must remain responsible for all the consequences which may result from his own act.

'11. The commander of a ship of war who may have recourse to such a proceeding should, in all cases, report the fact to his own Government, and should explain the reason of his having so acted. A communication of this report, and of the reasons which may have led to the verification, will be given officially to the Government to which the vessel may belong which shall have been subjected to inquiry as to her flag.

'In all cases in which this inquiry shall not be justified by obvious reasons, or shall not have been made in a proper manner, a claim may arise for indemnity.

'You will clearly understand that the foregoing instructions have reference only to vessels navigating under the French flag, and are intended mutually to prevent misunderstanding between the British and French Governments, but cannot affect the vessels of other nations with whom Great Britain has treaties for the suppression of the slave trade, or deprive her Majesty of the right to seize and detain vessels engaged in the slave trade, when not entitled to the protection of any national flag.'

which should be provided with special instructions for that purpose, as thereinafter mentioned, might visit such merchant vessels of the two nations as might upon reasonable grounds be suspected of being engaged in the African slave trade, or of having been fitted out for that purpose, or of having, during the voyage on which they should be met by the cruisers, been engaged in the African slave trade, contrary to the provisions of the treaty, and that such cruiser might detain and send or carry away such vessels, in order that they might be brought to trial in the manner thereinafter agreed upon; and it was by the said treaty further stipulated and agreed that the reciprocal right of search and detention should be exercised only within the distance of two hundred miles from the coast of Africa, and to the southward of the thirty-second parallel of north latitude, and within thirty leagues from the coast of the island of Cuba; by a treaty of February 17, 1863, it was further agreed between the two nations that the reciprocal right of visit and detention as defined in the article aforesaid might be exercised also within thirty leagues of the island of Madagascar; within thirty leagues of the island of Puerto Rico; and within thirty leagues of the island of San Domingo; and that the additional article should have the same force and validity as if it had been inserted word for word in the treaty of April 7, 1862, and should have the same duration as that treaty. By a convention of June 3, 1870, certain courts that were established in Africa, to adjudicate on alleged slavers, were abolished, and it was ordered that such vessels should be brought before the nearest Prize Court of their own State, or handed over to one of the cruisers of such State.[1]

[1] By 36 and 37 Vict., c. 88 (1873), it is enacted that 'where a vessel is, on reasonable grounds, suspected of being engaged in or fitted out for the slave trade, it shall (subject, in the case either of the vessel of a foreign State, or of the commander or officer of a cruiser of a foreign State, to the limitations, restrictions, and regulations, if any applicable thereto, contained in any existing slave trade treaty made with such State), be lawful: (*a*) if the vessel is a British vessel, or is engaged in the slave trade within British jurisdiction, or is not a vessel of a foreign State, for any commander or officer of any of her Majesty's ships, for any officer bearing her Majesty's commission in the army or navy, for any officer of her Majesty's customs in the United Kingdom, Channel Islands, or Isle of Man, for the governor of a British possession, or any person authorised by any such governor, and for any commander or officer of any cruiser of a foreign State, authorised in pursuance of any existing slave trade treaty; and (*b*) if the vessel is the vessel of a foreign State,

By the General Act of the Brussels Conference relative to the African slave trade, signed at Brussels, July 2, 1890, Great Britain, Germany, Austria, Belgium, Denmark, Spain, the Congo, the United States, France, Italy, Holland, Persia, Portugal, Russia, Sweden and Norway, Turkey and Zanzibar, declared the opportuneness of repressing the slave trade, by sea, in the maritime zone, which extends on the one hand between the coasts of the Indian Ocean (those of the Persian Gulf and of the Red Sea included), from Beloochistan to Point Tangalane (Quilimane), and on the other hand, a conventional line which first follows the meridian of Tangalane till it meets the 26th

for any commander or officer of any of her Majesty's ships, when duly authorised in that behalf, in pursuance of any treaty with that State, and for any commander or officer of any cruiser of that foreign State, to visit and seize and detain such vessel, and to seize and detain any person found detained or reasonably suspected of having been detained as a slave, for the purpose of the slave trade, on board any such vessel, and to carry away such vessel and person, together with the master and all persons, goods, and effects on board any such vessel, for the purpose of bringing in such vessel, person, goods, and effects for adjudication' (s. 3).

'The High Court of Admiralty of England and every Vice-Admiralty Court in her Majesty's dominions out of the United Kingdom shall have jurisdiction to try and condemn or restore any vessel, slave, goods, and effects alleged to be seized, detained or forfeited, in pursuance of this Act, and on restoring the same to award such damages in respect of the visitation, seizure, or detention of such vessel, goods and effects, and of any person on board such vessel, and in respect of any act or thing done in relation to such visitation, seizure, or detention, or in respect of any such matters, and in any case to make such order as to costs as, subject to the provisions of this Act and of any existing slave trade treaty, the court may think just. Provided that nothing in this section shall give to any court any jurisdiction inconsistent with any existing slave trade treaty over a vessel which is shown to such court to be the vessel of any foreign State, and which has not been engaged within jurisdiction in the slave trade, but where any vessel of a foreign State is liable to be condemned by a British slave court, such court shall have the same jurisdiction as if she were a British vessel' (s. 5).

'The regulations contained in any existing slave trade treaty for the time being in force, with respect to any mixed court or commission, shall have effect as if they were enacted in this Act, and such court or commission shall have all necessary jurisdiction for the purpose of carrying into effect any treaty referring to them, and in particular shall have jurisdiction to try, condemn, and restore British vessels seized in pursuance of such treaty on suspicion of being engaged in the slave trade, and shall, for the purpose of their jurisdiction, have the same power as any Vice-Admiralty Court in her Majesty's dominions has, and may accordingly take evidence, administer oaths, summon and enforce the attendance of witnesses, and acquire and enforce the production of documents in like manner as any such court' (s. 8).

By Order in Council of May 9, 1892, the General Act of the Brussels Conference 1890, relative to the slave trade, is declared to be from April 2, 1892, an existing slave trade treaty within the above statute.

degree of south latitude, is then merged in this parallel, then passes round the island of Madagascar by the east, keeping 20 miles off the east and north shore, till it crosses the meridian of Cape Amber; from this point the limit of the zone is determined by an oblique line which extends to the coast of Beloochistan, passing 20 miles off Cape Ras-el-Lad. Those of the above Powers, between whom there are special conventions for the suppression of the slave trade, have agreed to restrict to the above-mentioned zone the clauses of these conventions concerning the reciprocal rights of visit, search, and detention (*droit de visite, de recherche et de saisie*), of vessels at sea; also to limit these rights to vessels of less than 500 tons burthen. All other provisions of conventions concluded between the aforesaid Powers, for the suppression of the slave trade, remain in force in so far as they are not modified by this General Act. The above Powers undertake to exercise a strict supervision over native vessels authorised to fly their flag within the above zone, and over the commercial operations carried on by such vessels. When the officers in command of vessels of war of any of the above Powers have reason to believe that a vessel of less than 500 tons burthen, in the above zone, is engaged in the slave trade or is guilty of a fraudulent use of a flag, they may proceed to the verification of the ship's papers; it is, however, stipulated that this verification does not imply any change in the existing state of things, as regards jurisdiction in territorial waters. A boat commanded by a naval officer in uniform may be sent on board the suspected vessel after it has been hailed, to give notice of intention to verify the ship's papers; but investigation of the cargo, or search, can only take place with respect to a vessel navigating under the flag of a Power who has concluded, or may conclude, a special convention for rights of visit, search, and detention. If the officer in command of the cruiser is convinced that an act of slave trade has been committed on board during the passage, or that irrefutable proofs exist against the captain, or fitter-out, to justify a charge of fraudulent use of the flag, of fraud, or of participation in the slave trade, he shall take the detained vessel to the nearest port of the zone, where there is a competent authority, of the Power whose flag has been used. The suspected vessel may also be handed over to a

cruiser of its own nation, if the latter consents to take charge of it.[1]

Visit and search in time of war

§ 10. Although it is universally conceded that the vessels of one State cannot search a duly documented vessel of another State in time of peace, and although the right of visitation, if it exists at all (and since the announcement by Great Britain in 1858 probably no respectable Power will claim that it does exist, except in cases of piracy everywhere, or of vessels committing crimes against municipal law in the territorial waters of the Power making the visit, or of vessels suspected of having hostile intent against a Power in time of peace), must be limited, in time of peace, to the sole purpose of ascertaining the national character of a suspected vessel, it is, nevertheless, the incontestable right of the lawfully commissioned cruisers of every belligerent, *in time of war*, to visit and search, on the high seas, the merchant ships of every nation, whatever may be their character, cargoes, or destination. This right of visitation and search in time of war springs directly from the right of maritime capture; for without the former we must abandon the latter, or so extend it as to authorise the indiscriminate seizure of all merchant vessels that may be found upon the ocean; until they are visited and searched, it would be impossible to know whether or not they are liable to capture either from the ownership of the vessel, the nature of the cargo, or the character of the voyage. It will be shown hereafter, that while nearly all are agreed as to the general right of visitation and search, there is great diversity of opinion with respect to the circumstances under which a neutral vessel is liable to search, and with respect to the character and extent of the search which the belligerent is authorised to make.[2]

[1] See Appendix at end of this volume, Articles xxi., xxiii., xxiv., xxx. xlii., xliii., xlix.; also vol. i. p. 254. It should be observed that the above General Act came into force on April 2, 1892.

[2] Kent, *Com. on Am. Law*, vol. i. p. 153; Duer, *On Insurance*, vol. i. p. 725; Phillimore, *On Int. Law*, vol. iii. § 325; Martens, *Précis du Droit des Gens*, §§ 317, 321; Gallani, *Dei Doveri de' P. Neut.*, p. 458; Lampredi, *Del Commercio de' Popoli Neut.*, p. 185; Kluber, *Droit des Gens Mod.*, § 293; Hubner, *Saisie des Bâtimens Neutres*, tome i. pt. ii. p. 227; Azuni, *Droit Maritime*, tome ii. ch. iii. § 4; the 'Antelope,' 10 *Wheat. R.*, 66; Ortolan, *Diplomatie de la Mer*, tome ii. ch. vii.; Pistoye et Duverdy, *Traité des Prises*, tit. vi. ch. i.; Bello, *Derecho Internacional*, pt. ii. ch. viii. § 10; Heffter, *Droit International*, § 168; Hautefeuille, *Des Nations Neutres*, tit. xi. ch. i.; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 15.

English views as to extent of search

§ 11. Sir William Scott, in the case of the 'Maria' (1 *Rob.*, 360), said, that to visit and search merchant vessels on the high seas, whatever may be the ships, the cargoes, or the destinations, is the indubitable right of the lawfully commissioned cruisers of a belligerent nation, because, until they are visited and searched, it is impossible to know the character of a vessel or its destination. 'This right,' he says, 'is so clear in principle, that no man can deny it who admits the right of maritime capture; because, if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule, that free ships make free goods, must admit the exercise of this right for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice, for practice is uniform and universal on the subject. The many European treaties which refer to this right, refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception of even Hubner himself, the great champion of neutral privileges.

American writers

§ 12. The same view of this question is taken in the United States. Chancellor Kent says that the belligerent right of visitation and search is now 'considered incontrovertible;' and after giving a summary of the opinion of the English High Court of Admiralty in the case of the 'Maria,' he adds, the doctrine of the English Admiralty 'has been recognised, in its fullest extent, by the courts of justice in this country' (the United States). The opinion of Wheaton is equally decided. 'The right of visitation and search,' he says, 'of neutral vessels at sea, is a belligerent right, essential to the exercise of the right of capturing enemy's property, contraband of war, and vessels committing a breach of blockade. . . . Indeed, it seems that the practice of maritime captures could not exist without it. Accordingly, the text-writers generally concur in recognising the existence of this right.' Chief Justice Marshall, in the case of the 'Anna Maria,' said that 'the right to visit *and detain for search* is a belligerent right which cannot be drawn into question.' Notwithstanding that the ship's papers in this case were perfectly satisfactory, the Supreme Court held that the right to search the ship, in order to examine fully as to the character of her trade, was a complete right. The same court, in other cases, has

fully sustained Sir William Scott's opinion with respect to the extent of search authorised by the rules of international law.[1]

§ 13. The Continental publicists admit the general right of visitation and search, as a *belligerent* right authorised by the rules of international law, but they would restrict its exercise within very narrow limits. Hubner thinks it should be limited to the examination of the papers on board, in order to ascertain the neutrality of the vessel. Rayneval says that it should be limited to the coasts of the belligerents, and ought not to be exercised upon the high seas, any further than may be necessary to ascertain the actual neutrality of the vessel visited, because, he says, a neutral vessel on the high seas has no other duty to perform toward a belligerent than that of showing that she does not belong to the enemy, and that she is not sailing under a false flag; any further examination he deems an act of hostility. Hautefeuille considers that the right of visit may be exercised whatever acts of hostility are permitted; that is, in the territorial seas of the belligerents, and upon the ocean, but not in neutral waters. Moreover, that its object is not merely to ascertain the character of the vessel, whether it be enemy or neutral, but also, if the latter, to ascertain whether it is not violating neutral duty, and thereby rendering itself subject to capture. He, however, limits the examination to the papers produced, and will permit no further investigation where the visiting officer doubts, or pretends to doubt, their genuineness or the truth of their statements. To search for other papers, to interrogate the captain and crew, or to investigate the character of the cargo, he deems an abuse of the right of visit—acts entirely unauthorised, and which neutrals may and ought to resist with force. Lampredi, Azuni, and Ortolan are of the opinion that the visit cannot proceed beyond the examination of the papers, except where there is suspicion of fraud. Martens and Massé, though in some respects differing in their views, limit the right of search to the single case where the papers are incomplete or irregular.[2]

Continental writers

[1] Kent, *Com. on Am. Law*, vol. i. p. 154; Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 29; the 'Anna Maria,' 2 *Wheat. R.*, 327.

[2] Hautefeuille, *Des Nations Neutres*, tit. xii.; Rayneval, *De la Liberté des Mers*, tome i. chs. 16-21; Hubner, *De la Saisie de Bâtimens*, tome i. pt. ii. ch. iii.; Ortolan, *Dip. de la Mer*, liv. iii. ch. vii.; Massé, *Droit Commercial*, liv. ii. tit. ii. ch. ii.; Martens, *Essai sur les Armateurs*, ch. ii.;

Enforcement of the right of search

§ 14. The exercise of this right, within its true limits, whatever they may be, implies the right of using lawful force, if necessary, in its execution, the same as in the execution of a civil process on land. The *right* of search on the one side implies the *duty* of submission on the other; and as the belligerent may lawfully apply his force to the neutral property for the purpose of ascertaining its character and destination, it necessarily follows that the neutral may not lawfully resist the lawful exercise of the right of search. This duty of the neutral, says Sir William Scott, is founded on the soundest maxims of justice and humanity. There are no conflicting rights between nations at peace, and the right of search in the belligerent necessarily denies the right of resistance in the neutral. Any attempt, therefore, on the part of the neutral vessel, its owner, officers, or crew, to resist the lawful search of a duly commissioned cruiser of a belligerent power, is a violation of a duty imposed by the laws of war, and incurs a penalty proportioned to the nature of the offence.[1]

It must be exercised in a lawful manner

§ 15. But, although it is the duty of the neutral to submit to the lawful search of the belligerent, and to all acts that are necessary to accomplish that object, it by no means follows that the belligerent is subject to no restraints in the exercise of this right. It is not sufficient that the right is lawful, it must be exercised in a lawful manner. The right is limited to such acts as are necessary to a thorough examination into the real character of the vessel, her cargo, and voyage, and all acts that transcend the limits of this necessity are unlawful. For any improper detention of the vessel, or any unnecessary, and therefore unlawful, violence to the master or crew, the belligerent court of Admiralty is pretty certain to award full compensation in damages; and if this should be denied to the neutral, his own government may demand and enforce the redress of his wrongs. 'Whatever,' says Phillimore, 'may be the injury that casually results to an individual from the act of another, while pursuing the reasonable exercise of an established right, it is his misfortune. The law pronounces it *damnum absque injuriâ*, and the individual from whose act it proceeds is liable neither at law, nor in the forum of con-

Azuni, *Droit Maritime*, ch. iii. art. iv.; Lampredi, *Commerce des Neutres*, § 12; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 15.

[1] The 'Maria,' 1 *Rob. R.*, 340; the 'Eleanor,' 2 *Wheat. R.*, 345.

science. The principal right necessarily carries with it also all the means essential to its exercise. A vessel must be pursued in order to be detained for examination. And if, in the pursuit, she has been in any way injured (*e.g.* dismasted, upset, stranded, or even run on shore and lost), it would be an unfortunate case, but the pursuing vessel would be acquitted. The usual mode, adopted by most of the maritime powers of Europe, of summoning a neutral to undergo visitation, is the firing of a cannon on the part of the belligerent. This is called by the French *semonce*, *coup d'assurance*, and by the English *affirming gun*. It is, undoubtedly, the duty of the neutral to obey such a summons, but there is no positive obligation on the belligerent to fire such an *affirming gun*, for its use is by no means universal. Moreover, any other method, as hailing by signals, &c., of summoning a neutral to submit to an examination, may be equally as effective and binding as the *affirming gun*, if the summons is actually communicated to, and understood by, the neutral. The means used are not essential, but the fact of a summons actually communicated, is necessary to acquit the visiting vessels of all damages, which may result to the neutral disobeying it.'[1]

Penalty for resisting search

§ 16. The penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. 'For the proof of this,' says Sir William Scott,' 'I need only refer to Vattel, one of the most correct, and certainly not the least indulgent of modern professors of public law.' He then quotes § 114, ch. vii., liv. iii., of Vattel, *Droit des Gens*, and continues: 'Vattel is here to be considered not as a lawyer delivering an opinion, but as a witness asserting a fact—the fact that such is the existing practice of modern Europe.' After referring to other authorities, he closes his remarks on this point with the following emphatic declaration: 'I stand with confidence upon all principles of reason—upon the distinct authority of Vattel—upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down that, by the law of nations, as now understood, a deliberate and con-

[1] Ortolan, *Diplomatie de la Mer*, tome ii. ch. vii.; Phillimore, *On Int. Law*, vol. iii. §§ 331–333; Heffter, *Droit International*, § 169; Hautefeuille, *Des Nations Neutres*, tit. xi. ch. ii.; the 'Jeune Eugénie,' 2 *Mason R.*, 439; the 'Mariana Flora,' 11 *Wheat. R.*, 48; the 'Nereide,' 9 *Cranch. R.*, 392; Bello, *Derecho Internacional*, pt. ii. cap. viii. § 10.

tinued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequence of confiscation.' This penalty is not averted by the orders of the neutral Sovereign to resist the visitation and search of the belligerent cruiser. 'The law of nations,' says Duer, 'does not permit the sovereign power of a neutral State to interpose its authority for such a purpose, so as to vary the legal rights of the belligerent. . . . Hence the obedience of the neutral subject to the unlawful orders of his Government, so far from justifying his conduct, will impress him with the character of an enemy.' The resistance of the neutral cannot, therefore, be protected by any orders or instructions from his own Government, but the act must be judged of according to its own character.[1]

Can they exempt their convoys?

§ 17. Nor, according to the opinion of Sir William Scott, can the interposition of the authority of the neutral Sovereign, by the presence of an armed convoy, deprive the lawfully commissioned cruiser of the legal right of visitation and search. His language on this point is very clear and decided. 'Two Sovereigns,' he says, 'may unquestionably agree, if they think fit, as in some late instances they have agreed, by special covenant, that the presence of one of their armed ships along with their merchant ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than any pledge which they may agree mutually to accept. But surely no Sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independently of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it.'

Vessels of war are exempt from search

§ 18. This question leads to an examination of the powers, duties, and exemptions of public armed vessels on the high seas. The belligerent right of visit and search, whatever its extent or limitation, is undoubtedly confined exclusively to private merchant vessels; it does not apply to ships of war or to privateers. The immunity of such vessels on the high seas from the exercise of any right of visit and search, or of any

[1] The 'Elsabe,' 4 *Rob. R.*, 408.

other belligerent right, has been uniformly asserted and conceded. 'A contrary doctrine,' says Kent, 'is not to be found in any jurist or writer on the law of nations, or admitted in any treaty, and every act to the contrary has been promptly met and condemned.' 'A public vessel,' says Wheaton, 'belonging to an independent Sovereign, is exempt from every species of visitation and search, even within the territorial jurisdiction of another State; *à fortiori*, must it be exempt from the exercise of belligerent rights on the ocean, which belongs exclusively to no one nation?'[1]

Merchant ships under their convoy

§ 19. One of the most common, as well as one of the most important duties of public ships of war, is the *convoy* or protection of merchant vessels on the high seas. Can such convoying ships exempt the merchant vessels, under their protection, from the exercise of the right of visitation and search, from which they themselves are exempt? If so, may neutral vessels place themselves under such protection, and lawfully resist any attempt on the part of belligerent cruisers to subject them to such visitation and search? In other words, is the opinion of Sir William Scott, before referred to, a true exposition of the law of nations on this subject? If private

[1] Kent, *Com. on Am. Law*, vol. i. p. 157; Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 18.

The right of search does not apply to vessels of war (Thurloe's *State Papers*, vol. ii. 503; *Mr. Canning to Mr. Munroe*, August 3, 1807; *American State Papers*, vol. vi. p. 89), nor to civil or criminal process in ports, although this exemption is not founded on any absolute right, but upon principles of public convenience and the comity of nations. (The 'Prins Frederik,' 2 *Dods.*, 451; the 'Exchange,' 7 *Cranch.*, 116.) Further, it would seem that this concession may be withdrawn by the local authorities, and that although the ship and equipage existing as a ship of war, remain exempt, persons not forming part of the crew, and prize or other property, may become subject to the local authority. (*Opinions of the Attorneys-General of the United States*, vol. i. 47; vol. vii. 131; vol. viii. 79.)

When a war ship is boarded off a blockaded port, evidence of her character may be given by production of the captain's commission, and of the colours; also by the statement of the consul at the port.

The captain of a merchant steamer, when brought to by a vessel of war, is not privileged, by the fact that he has a government mail on board, from sending, if required, his papers on board the boarding vessel for examination; on the contrary, he is bound by that circumstance to the strictest performance of neutral duties and to special respect of belligerent right. (The 'Peterhoff,' 5 *Wall.*, 28.)

Two or three Danish ships of war were, during the war, seized by the Spaniards, carrying stores to Gibraltar. On the remonstrance of the Danish minister at Madrid, it was answered that they were not men-of-war that were stopped, but vessels which had made themselves merchantmen for the time. August 15, 1798. (*Life of Nelson*, vol. ii. p. 241.)

merchant vessels, so convoyed, are exempt from visitation and search, there can be no doubt that no resistance on their part to an attempt to visit or search them can draw after it any penalty; for in doing so they violate no duty. This question is properly divided into two parts: First, the case of convoy, by ships of war, of private vessels of the same State; and second, the case of convoy of merchant vessels of other neutral States. The discussions of publicists have been mainly confined to the first class of cases, although some have claimed that the convoying ship extends its own exemption to all neutral merchant vessels under its protection. Before examining into this distinction, we will give a brief summary of the various treaties on the subject of convoy, and the opinions of text-writers.

Treaties respecting neutral convoy

§ 20. Whatever may have been the ancient practice with respect to the effect of neutral convoy on the exercise of the belligerent right of visitation and search, it was not till near the middle of the seventeenth century that the question assumed any considerable importance. In the war of 1653, between England and Holland, Queen Christina, of Sweden, directed her merchant vessels to take all possible advantage of the convoy of her ships of war, and ordered such convoying ships to resist, even by force, every attempt on the part of the belligerents to visit the merchant vessels placed under their protection. This ordinance, however, was never executed, and the war was terminated soon after its publication. In the succeeding war, between England and Spain, Holland, now a neutral, claimed the exemption of her merchant ships under convoy, and an English squadron was obliged to content itself with the word of De Ruyter, that the vessel under his convoy carried nothing belonging to the King of Spain. England, however, refused to acknowledge any such right of exemption, and Holland herself, whenever a belligerent, always attempted to visit merchant vessels, under neutral convoy. Even when a neutral, she admitted the duty of the convoying ship to exhibit the papers of the merchant vessel under its escort, and if found to be irregular, the right of the belligerent cruiser to visit the suspected vessel, and even to seize and conduct it into port for trial. Nevertheless, she applauded the conduct of Captain Deval, in 1762, and of Admiral de Byland, in 1780, in forcibly resisting the attempt

of English men-of-war to visit merchant vessels under their convoy. None of the treaties of 1780 alluded to this question, but the resistance by the Swedish vessel of war, the 'Wasa,' in 1781, of an attempt of an English cruiser to visit a merchant vessel under convoy, revived the discussion, and the right of exemption was stipulated in a number of treaties, made soon after by Russia and Sweden, with other powers, and especially in the convention of armed neutrality, signed December 4–16, 1800. But in the convention of June 17, 1801, Russia herself conceded the belligerent right of ships of war to visit merchant vessels under neutral convoy. This convention was annulled in 1807. Since the peace of 1815 European treaties have generally, except where England was a party, stipulated for the exemption of merchant vessels under the convoy of public ships of the same State. The treaties which the United States have made with foreign powers, both before and since that period, have generally provided that, in case of convoy, the declaration of the commander of the convoy, that the vessels under his protection belong to the nation whose flag he carries, and when bound to an enemy's port, that they have no contraband goods on board, shall be sufficient. Such are the stipulations contained in the treaty with Sweden, of April 3, 1783; with France, of September 30, 1800; with Columbia, made October 3, 1824; with Brazil, made December 12, 1828; with Mexico, made April 5, 1831; with Chili, made May 16, 1832; with Peru-Bolivia, made November 13, 1836; with Venezuela, made January 20, 1836, &c. It is worthy of remark that the orders and decrees of the belligerents in the Crimean war were silent as to convoy; nor was it alluded to in the declaration of the Paris Conference, April 16, 1856.[1]

[1] Hautefeuille, *Des Nations Neutres*, liv. i. tit. ii. ch. xiv.; Heffter, *Droit International*, § 170.

Sir R. Strahan insisted on searching French convoys in the East Indies during the last century. (Brenton, vol. i.)

In 1800 a British squadron fell in with a Danish convoy under the frigate 'Freya.' Capt. Baker, of the 'Nemesis,' the senior British officer, hailed the 'Freya' to say he should send his boat on board the convoy. Capt. Krabbe, of the 'Freya,' replied that if such an attempt were made he would fire into the boat. Both threats were put into execution, and an action ensued which ended in the 'Freya's' submission. She was taken to the Downs, but still kept flying the Danish ensign and pendant by order of the vice-admiral of the station. Lord Whitworth was immediately sent to Denmark to place the business on an amicable footing. On August 29 Lord Whitworth terminated the negotiation with the

Opinions of publicists

§ 21. Recent Continental publicists have generally contended that neutral convoy exempts the convoyed vessel from visitation and search. Some have stated this proposition in general terms, while others limit it to merchant vessels convoyed by ships of war of their own nation, and put it on the ground that the declaration of the commander is sufficient as to the character and cargoes of the vessels of his own country under his escort and protection. Such are the general views of Martens, Rayneval, Klüber, Heffter, Massé, and Ortolan. Rayneval, however, is of the opinion that if the belligerent vessel should inform the convoying commander that he has evidence that one or more of the vessels under his escort are liable to capture for being really enemy's vessels, or because they have on board contraband goods, destined to an enemy's port, the commander should immediately proceed, in concert with the belligerent cruiser, to verify the truth of these allegations. This opinion is concurred in by Ortolan; but Hautefeuille thinks that such examination, if made, should be by the neutral officer only, and that his word, as to the character of his convoy, must suffice. This author has discussed the question of convoy at great length, and with marked ability. It must, however, be remembered, that he attempts to represent what *ought to be* the rule of international law on this subject, rather than what that law *really is* at the present time. English text-writers have adopted the opinion of Sir William Scott, with respect to the *right* to visit and search vessels under neutral convoy, and the effect of such convoy, when it tended to impede and defeat this belligerent right. Manning denies that neutrals, under convoy, can claim, under the general law of nations, to be exempted from

Danish Minister, Count Bernstorff, and a convention was mutually signed agreeing that the 'Freya' and convoy should be repaired at English expense and then released; that the right of the British to search convoys should be discussed at a future date in London; that Danish vessels should only sail under convoy to the Mediterranean, to protect them from the Algerines, and should be searchable as formerly; and that the convention should be ratified by the two Courts in three weeks. (James, *Nav. Hist.*, vol. iii. 63.)

By the Navy regulations of the United States, 1876, vessels of war are not to take under their convoy the vessels of any power at war with another, with which the United States are at peace, nor the vessels of a neutral, unless some very particular circumstances render it proper. The commanding officers are forbidden to permit the vessels under their protection to be searched or detained by any belligerent or cruiser.

search, as a matter of right, but he deems it desirable that it should be accorded to them by agreement. The United States have uniformly favoured the rule of exemption, and have, whenever possible, introduced it into their treaties with other powers. It must, however, be stated that American publicists have generally admitted that the exemption cannot be claimed as a matter of law, and that an attempt in this way to impede search will incur a penalty. Chancellor Kent says that 'the very act of sailing under the protection of a belligerent or *neutral* convoy, *for the purpose of resisting search*, is a violation of neutrality.' Wheaton, in his discussion of the Danish captures under the ordinance of 1810, referring to the English decisions respecting neutral convoys, says: 'Why was it that navigating under the convoy of a *neutral* ship of war was deemed a conclusive cause of condemnation? It was because it tended to impede and defeat the belligerent right of search; to render every attempt to exercise this lawful right a contest of violence; to disturb the peace of the world, and to withdraw from the proper forum the determination of such controversies by forcibly preventing the exercise of its jurisdiction.' Mr. Justice Story, in the case of the 'Nereide,' says: 'It is a clear maxim of national law that a neutral is bound to a perfect impartiality as to all the belligerents. If he incorporate himself into the measures or policy of either; if he become auxiliary to the enterprises or acts of either, he forfeits his neutral character—nor is this all. In relation to his commerce he is bound to submit to the belligerent right of search, and he cannot lawfully adopt any measures whose direct object is to withdraw that commerce from the most liberal and accurate search, without the application, on the part of the belligerent, of superior force. If he resists this exercise of lawful right, or if, with the view to resist it, he takes the protection of an armed neutral convoy, he is treated as an enemy, and his property is confiscated. Nor is it at all material whether the resistance be direct or constructive. The resistance of the convoy is the resistance of all the ships associated under the common protection, without any distinction whether the convoy belong to the same or a foreign neutral sovereign; for upon the principles of natural justice, a neutral is justly chargeable with the acts of the party which he

voluntarily adopts, or of which he seeks the shelter and protection.'[1]

Effect of enemy's convoy

§ 22. The question, whether neutral vessels under enemy's convoy are liable to capture and condemnation, has been frequently raised and most elaborately discussed. The Lords of Appeal in England decided, in the case of the 'Sampson,' that sailing under enemy's convoy was a *conclusive* ground of condemnation. There has been no direct decision on this subject by the Supreme Court of the United States. The question was not directly involved in the case of the 'Nereide,' but Mr. Justice Story in his dissenting opinion said: 'My judgment is, that the act of sailing under belligerent convoy is a violation of neutrality, and the ship and cargo, if caught *in delicto*, are justly confiscable; and further, that if resistance is necessary, as in my opinion it is not, to perfect the offence, still the resistance of the convoy is, to all purposes, the resistance of the association.' Chancellor Kent is clear, that 'the very act of sailing under the protection of a belligerent convoy, *for the purpose of resisting search*, is a violation of neutrality.' Duer, in his able work on Insurance, fully coincides in this opinion. Wheaton limits himself to a statement of his own arguments, as the advocate of the claims of American merchants against Denmark for condemnation, under the ordinance of 1810, for having made use of English convoy. The strongest point of his argument is, that being found in company with an enemy's convoy, even if *presumptive* evidence, certainly should not be regarded as *conclusive* of an intention to resist the search of a duly commissioned belligerent cruiser. 'This presumption,' he says, 'is not of that class of presumptions called *presumptiones juris et de jure*, which are held to be conclusive upon the party, and which he is not at liberty to controvert. It is a slight presumption only, which will yield to countervailing proof. One of the proofs which, in the opinion of the American negotiator, ought to have been admitted by the prize tribunal to countervail this presumption

[1] Kent, *Com. on Am. Law*, vol. i. p. 157; Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 32; Duer, *On Insurance*, vol. i. pp. 731, 732; the 'Nereide,' 2 *Cranch R.*, 438; the 'Catharine Elizabeth,' 5 *Rob. R.*, 232; Rayneval, *De la Liberté des Mers*, t. i. ch. xviii.; Kluber, *Droit des Gens Mod.*, § 293; Massé, *Droit Commercial*, liv. ii. ch. ii. sec. ix.; Ortolan, *Diplomatie de la Mer*, liv. iii. ch. vii.; Heffter, *Droit International*, § 170; Hautefeuille, *Des Nations Neutres*, tit. xi. ch. iii.; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 15.

would have been evidence that the vessel had been compelled to join the convoy; or that she had joined it, not to protect herself from examination by Danish cruisers, but against others, whose notorious conduct and avowed principles render it certain, that capture by them would inevitably be followed by condemnation. It followed then, that the simple fact of having navigated under British convoy could be considered as a ground of suspicion only, warranting the captors in sending in the captured vessel for further examination, but not constituting in itself a conclusive ground of confiscation.' This argument of Wheaton was ably answered by the Danish authorities, who held that 'the only point to be established is, whether the neutral was *voluntarily* under enemy's convoy.' If so, condemnation must inevitably follow. The negotiation finally terminated in a treaty to pay the American claimants, *generally*, a fixed sum, *en bloc*, but without any admission by either party of the correctness of the other's views on this question of international law. The English commentators on this discussion regard the Danish ordinance as in perfect conformity with the law of nations. Hautefeuille states the arguments of both parties without expressing his own opinion. Ortolan admits that the act of a neutral navigating under the convoy of a belligerent may be irregular and even illegal, and that such a convoy cannot always exempt from search. 'Mais,' he says, 'si le neutre se joint en pleine mer à un, ou à plusieurs navires de guerre belligérants et navigue de concert avec ces navires, sans prétendre à aucune protection de leur part, dans la seule espérance de pouvoir échapper pacifiquement et par la fuite à la visite, à la faveur d'une rencontre et d'un combat possible entre les seuls belligérants, c'est là de sa part une ruse innocente qui ne peut lui être imputée à délit, et qui ne peut pas, à elle seule, entraîner la confiscation.' Perhaps the foregoing remarks of Ortolan are too strongly expressed, for, in the very case he describes, the neutral merchant vessel uses the force of the belligerent convoy to escape search. It is not only a constructive but a virtual resistance. The case, however, is very different where the merchant vessel has left the convoy prior to the appearance of, or attempted search by, the belligerent cruiser; as, for example, where the convoy was used on the outward voyage, and the capture made during the return voyage. This distinction is forcibly

presented by Wheaton, in his argument in favour of the American claimants for indemnity for Danish captures under the ordinance of 1810.[1] We know of no judicial decision directly upon this question.[2]

Effect of resistance of neutral master

§ 23. 'The resistance of a neutral master,' says Sir Wm. Scott, in the 'Catherina Elizabeth,'[3] before quoted, 'will undoubtedly reach the property of the owner; and it would, I think, extend also to the whole property entrusted to his care, and thus fraudulently attempted to be withdrawn from the operation of the rights of war.' 'Confiscation,' says Chancellor Kent, 'is applied, by way of penalty, for resistance to search, to all vessels, without any discrimination as to the national character of the vessel or cargo, and without separating the fate of the cargo from that of the ship.' Duer holds that a forcible resistance to a lawful search is a distinct and substantial course of condemnation, and involves all the property under the charge of the neutral master; not merely that of its owners, but of the shippers, although between them and himself no relation of principal and agent can be said to exist. 'The goods may be wholly innocent, in their nature, and from their destination, and their true character, and that of the ship as neutral may be undoubted, but the unlawful resistance, from the time it is attempted, stamps on them all an illegal character, and involves them all in its fatal penalty.' The offence being regarded as of a greater criminality and more dangerous in its effects than the transportation of contraband or the violation of a blockade, the severity of the penalty is the greater. The forcible resistance of an *enemy* master will not, in general, affect neutral property laden on board an enemy's *merchant vessel*; for an attempt on his part to rescue his vessel from the possession of the captor is nothing more than the hostile act of a hostile person, who has a perfect right to make such an attempt.' 'If a *neutral* master,' says Sir William Scott, 'attempts a rescue, or to withdraw himself from search, he violates a *duty* which is imposed on him by the law of nations, to submit to search, and to come in for enquiry as to the property of the ship or cargo; and if he

[1] See Laurence's Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 32.

[2] Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. xiv.; Martens, *Nouveau Recueil*, tome viii. p. 350; Elliot, *American Diplomatic Code*, vol. i. p. 453; the 'Nereide,' 9 *Cranch. R.*, 442.

[3] 5 *Rob.*, 232.

violates this obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner, and it would, I think, extend also to the whole property entrusted to his care, and thus fraudulently attempted to be withdrawn from the operation of the right of war. With an *enemy* master, the case is very different; no duty is violated by such an act on his part—*lupum auribus teneo*, and if he can withdraw himself he has a right to do so.'

Neutral property in enemy's vessels

§ 24. The Supreme Court of the United States has applied the same rule to *neutral* property in *an armed enemy* vessel, and in the case of the 'Nereide,' decided in 1815, it was held that a neutral had a right to charter and lade his goods on board a belligerent armed merchant ship without forfeiting his neutral character, unless he actually concurred and participated in the enemy master's resistance to capture. This doctrine was re-affirmed in 1818, in the case of the 'Atalanta,' notwithstanding the contrary opinion of Sir William Scott in the case of the 'Fanny,' decided contemporaneously with that of the 'Nereide.' The reasoning of the Supreme Court most ably sustains its decision, notwithstanding the powerful arguments in the dissenting opinion of Mr. Justice Story, supported as it is by the opinions of Kent and Duer, among American writers, and by the decision of Sir William Scott in the case of the 'Fanny' and the authority of English publicists generally. The question does not seem to have arisen in the Continental courts. Hautefeuille sustains, on principle, the American decision against that of Sir William Scott, while Ortolan merely states the contradiction between the English and American decisions on this question, without expressing any opinion of his own upon the particular question involved.[1]

Documents required to prove neutral character

§ 25. The acknowledged belligerent right of visitation and search draws after it a right to the production and examination of the ship's papers. With respect, however, to the nature and character of the papers which the neutral is bound to have on board, there is some difference of opinion. A list of papers usually to be expected is given at p. 98, in chapter xxii. Some Continental writers contend that the

[1] The 'Nereide,' see p. 285; the 'Fanny,' 1 *Dod. Ad. R.*, 443; the 'Atalanta,' 3 *Wheat. R.*, 409; Hautefeuille, *Des Nations Neutres*, tit. xi. ch. 420; Ortolan, *Diplomatie de la Mer*, tome iii. ch. vii.

ordinary sea letter or passport is all that is required, as that must establish the nationality of the vessel. If, however, it has been agreed between the belligerent and neutral, that certain papers executed in a particular form shall be carried, the absence of such papers, so executed, may be good ground of seizure. But English and American writers, as well as the decisions of the prize courts of the two countries, have held that the neutral vessel may be required to have on board, and to produce when visited, such other documentary evidence as is usually carried, and deemed necessary to establish the character of the ship and its cargo; and that the absence or non-production of such papers may, or may not, be good cause for capture and condemnation, according to the particular circumstances of the case. The rule is very clearly stated by Chancellor Kent. 'A neutral is bound,' he says, 'not only to submit to search, but to have his vessel duly furnished with the genuine documents requisite to support her neutral character. The most material of these documents are the register, passport or sea letter, muster roll, log book, charter party, invoice, and bill of lading. The want of some of these papers is strong presumptive evidence against the ship's neutrality, yet the want of any one of them is not absolutely conclusive. *Si aliquid ex solemnibus deficiat, quum equitas poscit, subveniendum est.*' [1]

Concealment of papers

§ 26. Sometimes the neutral vessel produces the principal papers necessary to show her neutrality and the innocent character of her cargo, but conceals others which might have a contrary effect, as, for example, secret instructions relating to her destination and the landing of goods, &c. Those who deny the right of search beyond the verification of her sea letter, or manifest, justify such concealment. But English and American writers are of opinion that concealment is in itself a serious offence against the belligerent right of visit and search. The rule of international law on this question is thus stated by Chancellor Kent: 'The concealment of papers,' he says, 'material for the preservation of the neutral character, justifies a capture, and carrying into a port for

[1] Kent, *Com. on Am. Law*, vol. i. p. 157; Duer, *On Insurance*, vol. i. pp. 734, 735; Martens, *Essai sur les Armateurs*, ch. ii. § 22; Massé, *Droit Commercial*, liv. ii. tit. i. ch. ii.; Pistoye et Duverdy, *Des Prises*, tit. vi. ch. ii. sec. iv.; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 15.

adjudication, though it does not absolutely require a condemnation. It is good ground to refuse costs and damages on restitution, or to refuse further proof to relieve the obscurity of the case, where the cause laboured under heavy doubts, and there was *primâ facie* ground for condemnation independent of the concealment.'

Spoliation of papers

§ 27. The spoliation of the papers of a ship, subjected to the visitation and search of a belligerent cruiser, is a still more aggravated circumstance of suspicion than that of their denial or concealment, and, in most countries, would be sufficient to infer guilt and exclude further proof. 'But it does not in England,' says Kent, 'as it does by the maritime law of other countries, create an absolute presumption *juris et de jure*; and yet a case that escapes with such a brand upon it is saved so as by fire. The Supreme Court of the United States has followed the less rigorous English rule, and held that the spoliation of papers was not, of itself, sufficient ground for condemnation, and that it was a circumstance open for explanation, for it may have arisen from accident, necessity, or superior force. If the explanation be not prompt and frank, or be weak and futile; if the cause labours under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is good cause for the denial of further proof; and the condemnation ensues from defects in the evidence, which the party is not permitted to supply. The observation of Lord Mansfield, in Bernardi *v.* Motteaux, was to the same effect. By the maritime law of all countries, he said, throwing papers overboard was considered as a strong presumption of enemy's property; but, in all his experience, he had never known a condemnation on that circumstance only.'[1]

Use of false papers

§ 28. 'The use of false papers,' says Duer, 'although in all cases morally wrong, is not in all cases a subject of legal animadversion in a court of prize. Such a court has no right to consider the use of the papers as criminal, where the sole object is to evade the municipal regulations of a foreign country, or to avoid a capture by the opposite belligerent. The falsity is only noxious where it certainly appears, or is reasonably presumed, that the papers were

[1] Kent, *Com. on Am. Law*, vol. i. p. 158; Bernardi *v.* Motteaux, *Doug. R.*, 581.

framed with an express view *to deceive the belligerent by whom the capture is made*, so that, if admitted as genuine, they would operate as a fraud on the rights of the captors. It is not sufficient that the papers disclose the most disgusting preparations of fraud in relation to a different voyage or transaction. The fraud must certainly, or probably, relate to the voyage or transaction which is the immediate subject of investigation.' [1]

Impressment of seamen from neutral vessels

§ 29. In the wars immediately resulting from the French revolution, the British Government attempted to engraft upon the right of visitation and search the right of impressment of seamen by British cruisers from American merchant vessels. The deep feeling of opposition, in the United States, to this claim of Great Britain co-operated most powerfully with other causes to produce the war of 1812 between the two countries.[2] The war was terminated by the treaty of Ghent,

[1] Duer, *On Insurance*, vol. i. p. 738; the 'Eliza and Katy,' 6 *Rob. R.*, 192; the 'St. Nicholas,' 1 *Wheat. R.*, 417; Blaze *v.* N. Y. Ins. Co., 1 *Caines R.*, 565; Phœnix Ins. Co. *v.* Pratt, 2 *Binney R.*, 308; the 'Mars,' 6 *Rob. R.*, 79; the 'Phœnix,' 3 *Rob. R.*, 186; the 'Zulema,' 1 *Act. R.*, 14.

[2] In 1798 not only merchantmen, but vessels of war of the United States were searched by the British ships of war. His Majesty's ship 'Carnatic,' 74, boarded an American vessel of war off Havannah. The United States Government issued orders to their vessels never to submit when they had the means of resistance, and never to part with the men unless the vessel was taken. (Brenton, vol. i.) But, on the other hand, Americans seduced British seamen, and even soldiers in their regimentals.

By Art. 45 of the British Regulations of 1787 it was ordered to demand English seamen out of foreign ships *wherever* met with.

In 1794 the Minister of the United States in England complained that a large number of American vessels had been irregularly captured and as improperly condemned, and thereby under colour of his Majesty's authority great injury had been done to American merchants. Also that citizens of the United States had been impressed into the King's service. It was explained on behalf of the British Government that, although in a naval war extending over four quarters of the globe, some inconvenience must accrue to the commerce of neutral nations which no care could prevent, his Majesty would always desire that the fullest opportunity be given to all to prefer complaints and to obtain redress and compensation, that in most cases they could be redressed by the usual judicial procedure at a very small expense, and without other interposition; but if cases should be found wherein redress could not be obtained in the ordinary way, his Majesty would readily discuss measures to be established for that purpose; that if American seamen had been impressed, it was contrary to his Majesty's desire, but that there was great difficulty in discriminating between British and American seamen, especially when there so often existed an interest and intention to deceive.

A return to Congress, in 1806, states that the aggregate number of impressments of American seamen into British service, from the com-

on the basis of the *status quo ante bellum*, leaving the questions of maritime law which led to the war still unsettled.

mencement of the war in Europe to that date, was 2,273 ; of these, forty-three were passengers.

James, referring to this subject in his *Naval History* in 1826, says that the crew of a vessel, armed or unarmed, sailing under the flag of the United States, usually consists of one or more of the following classes : 1, native American citizens ; 2, American citizens, wherever born, who were such at the definitive treaty of peace in 1783 ; 3, foreigners in general, who may or may not have become citizens of America subsequently to the treaty in question ; 4, deserters from the British army or navy, whether natives of Britain or of any other country. He considers that to the first class Great Britain cannot have the shadow of a right ; and from such of the second as were British born she barred herself by the treaty acknowledging the independence of the revolted colonies. Of the third class, the only portion which England can have any pretension to seize are the subjects of the Power or Powers with whom she may be at war, and her own native subjects. With respect to the former, the very act of entering on board a neutral implies that the foreigner has thrown off his belligerent character ; he is a non-combatant of the most unequivocal description, and, as such, entitled to exemption from seizure. A passenger, especially if a military man, might be an exception. When, by the maritime ascendency of England, France could no longer trade for herself, America proffered her services, as a neutral, to trade for her ; and American merchants and their agents, in the gains that flowed in, soon found a compensation for all the perjury and fraud necessary to cheat the former out of her belligerent rights. The high commercial importance of the United States, thus acquired, coupled with a similarity in language, and, to a superficial observer, a resemblance in person, between the natives of America and Great Britain, has occasioned the former to be the principal, if not the only, sufferers by the exercise of the right of search. Chiefly indebted for their growth and prosperity to emigration from Europe, the United States hold out every allurement to foreigners, particularly to British seamen, whom, by a process peculiar to themselves, they can naturalise as quickly as a dollar can exchange masters, and a blank form, ready signed and sworn to, can be filled up. It is the knowledge of this fact that makes British naval officers, when searching for deserters from their service, so harsh in their scrutiny, and so sceptical of American oaths and asseverations. (*Nav. Hist.*, vol. iv. 325.)

The ancient right of Great Britain to impress seamen for the Royal Navy from her own merchantmen has been modified by various statutes. The 19 Geo. III., c. 75 (repealed by Stat. Law Rev. Act, 1871), 'in an arduous and difficult conjuncture,' suspended four statutes which modified or limited the above right—viz. the 2 and 3 Anne, c. 6, s. 8, the 13 Geo. II., c. 17, the 2 Geo. III., c. 15, s. 22, and the 11 Geo. III., c. 38, s. 19—for the space of five months, except as far as regarded coal vessels.

By the 19 Geo. II., c. 30, 'no mariner or other person who shall serve on board or be retained on board any privateer or trading ship or vessel that shall be employed in any of the British sugar colonies in the West Indies, in America, nor any mariner or other person being on shore in the said British sugar colonies, nor any of them shall be liable to be impressed or taken away, or shall be impressed or taken away, in or from any of the said British sugar colonies or any of them, or any of the ports thereof, or at sea in those parts, by any officer or officers of or belonging to any of his Majesty's ships of war empowered by the Lord High Admiral of Great Britain or the Lords Commissioners, &c,

It is not probable, however, after the discussions which have taken place on this subject, that the British Government will ever again enforce this alleged right of impressment from foreign merchant vessels. The British Government seemed to regard the right of impressment from neutral merchant vessels as incident to, rather than as a part of, the right of search. It is submitted that, by the English law, the subject owes a perpetual and indissoluble allegiance to the Crown, and is under the obligation, in all circumstances, and for his whole life, to render military service to the Crown, whenever required; and that it is a legal exercise of the prerogative of the Crown to enforce this obligation of the subjects, wherever they may be found; that the right of search being conceded by the laws of war, it gives the right of examining the crews of neutral vessels, and if, on such examination, British seamen be found among them, such seamen may be forcibly taken from the neutral vessels, and carried on board British cruisers. In reply, the American Government says that, whatever may be the obligations existing between the crown of England and its subjects, the English law cannot be enforced beyond the dominions and jurisdiction of that government; that every merchant vessel on the high seas being rightfully considered as a part of the territory of the country to which it belongs, to attempt to enforce the peculiar law of England on board such vessel, is to assert and exercise an extra-territorial authority for the law of British prerogative. 'If this notion of perpetual allegiance,' says Mr. Webster, 'and the consequent power of the prerogative was the law of the world; if it formed part of the conventional code of nations, and was usually practised, like the right of visiting neutral vessels for the purpose of discovering and seizing enemy property, then impressment might be defended as a common right, and there would be no remedy for the evil, till the national code should be altered. But this is by no means the case. There is no such principle incorporated into the code of nations. The doctrine stands only as English law, not as national law; and English law cannot be of force beyond English

or any other person whosoever, unless such mariner shall have before deserted from such ship of war belonging to his Majesty.' This statute is discussed in Spieres *v.* Parker (1 *Term R.*, 141); it is repealed by 27 and 28 Vict., c. 23, s. 1.

dominion. Whatever duties and relations that law creates between the sovereign and his subjects can be enforced and maintained only within the realm, or proper possessions, or territory of the sovereign. There may be quite as just a prerogative right to the property of subjects as to their personal services, in an exigency of the State; but no government thinks of controlling, by its own laws, property of its subjects situated abroad; much less does any government think of entering the territory of another power, for the purpose of seizing such property, and applying it to its own uses. As laws, the prerogatives of the crown of England have no obligations on persons or property domiciled or situated abroad.'

American rule on this subject

§ 30. 'The American Government,' continues Mr. Webster, 'is prepared to say that the practice of impressing seamen from American vessels cannot hereafter be allowed to take place. That practice is founded on principles which it does not recognise, and is invariably attended by consequences so unjust, so injurious, and of such formidable magnitude, as cannot be submitted to. In the early disputes between the two governments on this so long contested topic, the distinguished person to whose hands were first committed the seals of this department declared, that the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such! Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration, now had, of the whole subject, at a moment when the passions are laid, and no present interest or emergency exists to bias the judgment, have fully convinced this Government that this is not only the simplest and best, but the only rule, which can be adopted and observed consistently with the rights and honour of the United States, and the security of their citizens. That rule announces, therefore, what will hereafter be the principle maintained by their Government. In every regularly documented American merchant vessel, the crew who navigate it will find their protection in the flag which is over them.'[1]

[1] Webster to Lord Ashburton, Aug. 8, 1842; Webster, *Dip. and Off. Papers*, pp. 97, 101; Webster, *Works*, vol. v. p. 142, vol. vi. p. 329.

CHAPTER XXVIII

VIOLATION OF NEUTRAL DUTIES

1. The rights and duties of neutrality are correlative—2. Violation of neutral duty by a State—3. By individuals—4. Criminal character of such violations—5. Neutral vessels transporting enemy's goods—6. Opinions of publicists—7. Neutral goods in enemy ships—8. Maxims of 'free ships free goods,' and 'enemy ships enemy goods'—9. These maxims in the U. S.—10. Treaties and ordinances—11. France and England in 1854—12. Congress of Paris in 1856—13. Rule of evidence with respect to neutral goods in enemy ships—14. Neutral ships under enemy's flag and pass—15. Neutral goods in such vessel—16. Neutral vessel in enemy's service—17. Transporting military persons—18. Conveying enemy's despatches—19. The case of the 'Trent'—20. Rule of 1756 and rule of 1793—21. Explication of them—22. Distinction between them—23. Effect on American commerce of the rule of 1793—24. Opinions of Story and of Phillimore—25. Views of American Government—26. Change of British colonial policy.

The rights and duties of neutrality are correlative

§ 1. ANY act of positive hostility on the part of a neutral State towards one of the belligerents in a war, is deemed a breach of neutrality, and makes such State a party in the war. The rights and duties of neutrality are correlative, and the former cannot be claimed, unless the latter are faithfully performed. If the neutral State fail to fulfil the obligations of neutrality, it cannot claim the privileges and exemptions incident to that condition. The rule is equally applicable to the citizens and subjects of a neutral State. So long as they faithfully perform the duties of neutrality, they are entitled to the rights and immunities of that condition. But for every violation of neutral duties, they are liable to the punishment of being treated in their persons or property as public enemies of the offended belligerent.[1] Imperfect or qualified neutrality is no longer supported by custom, although it for-

[1] Kent, *Com. on Am. Law*, vol. i. pp. 115–117; Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 1; Vattel, *Droit des Gens*, liv. iii. ch. vii. § 104; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xi.; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 9.

merly was in use. A Government bound by capitulations to supply mercenaries to a belligerent would, in time of war, be in a state of qualified neutrality. This has been fully dealt with in chapter xix.[1]

Violation of neutral duty by a State

§ 2. Having already discussed the mutual duties of States in times of peace, it will not be necessary here to make any extended argument to enforce those duties on the part of the neutral State toward other States with which it remains at peace, while they are carrying on hostilities towards each other. Its duty is that of entire impartiality, as well as neutrality. Should a neutral government, without cause or provocation, complaint or warning, attack the possessions, or capture the ships of a belligerent power, all would denounce the aggression as a flagrant outrage on the laws of justice as well as of humanity; yet it is precisely of this violation of justice, although in a milder form, that a neutral government is guilty, that, while it affects to maintain the relations of friendship with contending belligerent powers, furnishes to one effectual aid in the prosecution of the war, by a supply of ships, or arms, or munitions of war. With whatever pretext the government may veil its conduct, its acts are those of unprovoked and causeless, and, therefore, unjust hostility. A violation of neutrality is not limited to acts of positive hostility. If the neutral State assist one of the belligerents; if it grant favours to one to the detriment of the others; if it neglect or refuse to maintain the inviolability of its territory; or if it fail to restrain its own citizens and subjects from overstepping the just bounds of neutrality, as defined and established by the law of nations—it violates its duties towards the belligerent who is injured by such act or neglect, and is justly chargeable with hostility. Such conduct furnishes good cause for complaint, and, if persisted in, may become just cause of war. Sir Wm. Scott very justly remarked that *there are no conflicting rights between nations at peace*; which remark may be applied, with truth, to every case of a violation of neutral duty.[2]

[1] Neutralisation is distinct from neutrality. It consists in the obligation on a State of abstention from war except in the strictest self-defence; but a State cannot be *neutralised* except with the concurrence of all other States affected by such neutralisation.

[2] Bello, *Derecho Internacional*, pt. ii. ch. vii. §§ 1-3; Harrat *v.* Wise, 9 *B. and C.*, 712; Naylor *v.* Taylor, 9 *B. and C.*, 715; Medeiros *v.* Hill, 8 *Bing. R.*, 231; the 'Maria,' 1 *Rob.*, 360; Pitkin, *Civil and Pol. Hist. of U. S.*, vol. i. ch. x.

Responsibility of individuals for violation of neutral duties

§ 3. But while the law of nations holds the government of the neutral State responsible for any act of positive hostility committed by its officers, or, in most cases, by its citizens and subjects, it is not in general held responsible for ordinary violations of neutral duty (not in themselves of positive hostility) by such citizens or subjects. The law in such cases imposes the duty upon the individual, and if it be violated the penalty is imposed and enforced upon the individual by the capture and confiscation of his property. Thus, the neutral State is not bound to restrain its subjects from engaging in contraband trade, or from violating the right of visitation and search, or the law of sieges and blockades; the law imposes upon the individual the duty of abstaining from such illegal acts, and, if guilty of a violation of this duty, he is the one to suffer the punishment due to the offence. Nor do the courts of a neutral country, as a general rule, enforce penalties for violations of neutral duty.[1] As before remarked, there are certain obligations of neutrality, such as abstaining from acts of positive hostility, which the neutral State is bound to enforce with respect to its subjects; its own municipal laws in relation to such matters are, of course, administered by its own tribunals. But such courts do not enforce penalties for carrying contraband of war, for a breach of blockade, or for violating the belligerent right of visitation and search. All such cases are left to be adjusted by the prize tribunals of the belligerents. As to the rules of the Treaty of Washington, 1871,[2] concerning the fitting out and arming of vessels for warlike use in the ports of a neutral, and laying down certain principles of neutrality as binding on the Government of a neutral country, it must be noticed that they are only binding as between Great Britain and the United States of America, and any other maritime Power (if any) who may in the future accede to those rules. They must be looked upon rather in the light of peculiar treaty obligations than as real principles of international law. Their interpretation is far from easy.

§ 4. It may be stated, as a general principle which lies at

[1] *Ex parte* Chavasse, *re* Grazebrook, 2 *Mar. Law Cas.* (*Chan.*), 197; Webster, *Dip. and Off. Papers*, pp. 309, 310; Lee, *Opinions of U.S. Attys.-Genl.*, vol. i. p. 61; Heffter, *Droit International*, §§ 148, 172; Ortolan, *Diplomatie de la Mer*, tome ii. ch. vi.

[2] See *ante*, ch. xxiv. § 154.

the foundation of the rules of international law relating to neutral duties, that their violation is neither innocent nor lawful. It is not simply the penalty incurred by such violation that makes it wrong, as some have asserted; nor is it correct to say that, if the neutral merchant is willing to incur the risk of capture and condemnation, he may engage, with entire security of conscience, in a trade forbidden by the law of nations. The act is wrong in itself, and the penalty results from his violation of moral duty, as well as of law. The duties imposed upon the citizens and subjects flow from exactly the same principle as those which attach to the Government of the neutral States. 'Where he supplies to the enemy,' says Duer, 'munitions or other articles contraband of war, or relieves with provisions, or otherwise, a blockaded port, although his motives may be different, his moral delinquency is precisely the same. By these acts he makes himself personally a party to a war, in which, as a neutral, he had no right to engage, and his property is justly treated as that of an enemy.'[1] It appears, from early decisions in the courts of Common Law in England, that the above doctrine has been explicitly recognised.

Where a citizen offers supplies to an enemy

§ 5. The first question which presents itself for consideration, as connected with neutral duties, is the transport of goods of an enemy in a neutral vessel. 'Whatever may be the true original abstract principle of natural law on this subject,' says Wheaton, 'it is undeniable that the constant usage and practice of belligerent nations, from the earliest times, have subjected enemy's goods in neutral vessels to capture and condemnation as prizes of war. This constant and universal usage has only been interrupted by treaty stipulations, forming a temporary conventional law between the parties to such stipulations. The regulations and practice of certain maritime nations, at different periods, have not only considered the *goods* of an enemy laden in the ships of a friend liable to capture, but have doomed to confiscation the neutral *vessel*, on board of which these goods were laden. This practice has been sought to be justified upon a supposed analogy with that provision of the Roman law, which in-

Neutral vessels transporting enemy's goods

[1] Duer, *On Insurance*, vol. i. pp. 531, 754, 755, 772–775; the 'Shepherdess,' 5 *Rob.*, 264; Pistoye et Duverdy, *Traité des Prises*, tit. vi. ch. ii. sec. iii.; Hautefeuille, *Des Nations Neutres*, tit. 15.

volved the vehicle of prohibited commodities in the confiscation pronounced against the prohibited goods themselves. Thus, by the marine ordinance of Louis XIV., of 1681, all vessels laden with enemy's goods are declared lawful prizes of war. The contrary rule had been adopted by the preceding prize Ordinances of France, and was again revived by the *règlement* of 1744, by which it was declared that, in case there should be found on board of neutral vessels, of whatever nation, goods or effects belonging to his Majesty's enemies, the goods or effects should be good prize, and the vessel should be restored.'[1] Valin, in his commentary upon the Ordinance, admits that the more rigid rule, which continued to prevail in the French prize tribunals from 1681 to 1744, was peculiar to the jurisprudence of France and Spain; but that the usage of other nations was only to confiscate the goods of the enemy. The concurring testimony of text-writers is that, by the usage of the world, *neutral vessels* are not liable to condemnation for carrying *enemy goods*, whatever rule may be adopted or enforced with respect to the condemnation of the goods themselves. The transport of enemy's goods in a neutral vessel cannot, therefore, be regarded, in general, as a violation of any neutral duty, or as an act subject to any punishment.

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. §§ 19, 20; Wheaton, *Hist. Law of Nations*, pp. 111–119, 200–206; Albericus Gentilis, *Hist. Advoc.*, lib. i. ch. xxvii.; Valin, *Com. sur l'Ord.*, liv. iii. tit. ix.

In 1640 it was asserted, on the authority of Sir H. Martin, that it had never been the practice to condemn neutral ships for having enemy's goods on board, but the freight of the enemy's goods condemned was always paid. (Sydn., *State Papers*, vol. xxi. p. 662.) The Court books of the Admiralty show the case of the 'Pearl,' in which a question was raised, in 1704, on the point concerning freight. In the result freight was decreed, although the cargo was condemned.

In 1753, in the celebrated answer to the Prussian memorial, it is asserted that in the case of ships restored freight was paid for such of the goods as manifestly belonged to the enemy, and were condemned; and amongst the list of Prussian cases referred to there is a class described, 'Ships restored with freight according to the bills of lading for such goods which were found to be the property of enemy, and condemned as prize.' It was the invariable practice of the British Court of Admiralty during the wars of 1801, unless in cases where some circumstances of *mala fides* occurred, or where the ship was adjudged to have drawn on herself the loss of freight—as a penalty for some act which, though a departure from pure neutral conduct, has not, according to the practice of the law of nations, made her liable to condemnation.

In 1866, upon a seizure of a neutral vessel engaged in shipping coin under circumstances adapted to excite reasonable suspicion, there being no proof that it was enemy's property, a decree was made by the Supreme

Opinions of English and American text-writers

§ 6. The rule of international law, as stated above by Wheaton, with respect to enemy goods in neutral vessels, is sustained by English and American text-writers, and by the older Continental publicists, as Bynkershoek, Heineccius, Cocceius, Vattel, Lampredi, Azuni, &c., while Hubner, Kluber, Rayneval, Jouffroy, Massé, Ortolan, and Hautefeuille have not only attacked its principles, but have denied its correctness as a rule of law. Hautefeuille has discussed the question at great length, and with marked ability. His conclusions are:—'1. That neutrals may freely transport in neutral vessels the goods of one of the belligerents, except contraband of war. 2. That belligerents have not, in any case, the right to seize the property of their enemy in neutral vessels; in a word, that *free ships make free the merchandise which they carry, whatever may be the ownership.*' [1]

Court of the United States restoring the vessel and cargo, including the coin, but apportioning the costs and expenses consequent on the capture rateably between the vessel and coin, exempting from contribution the rest of the cargo. (The 'Dashing Wave,' 5 *Wall.*, 170.)

[1] Azuni, *Droit Maritime*, tome ii. ch. iii.; Lampredi, *Du Commerce*, &c., pt. i. § 10; Cocceius, *De Jure Belli in Amicos*; Vattel, *Droit des Gens*, liv. iii. ch. vii. § 115; Heineccius, *De Navium*, &c., com. ii. §§ 8, 9; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. iv.; Hubner, *Saisie des Bâtimens*, tome i. pt. ii. ch. ii.; Rayneval, *De la Liberté des Mers*, tome i. ch. vi.; Jouffroy, *Droit Maritime*, pp. 188 et seq.; Massé, *Droit Commercial*, liv. ii. tit. i. ch. ii. sec. ii.; Ortolan, *Diplomatie de la Mer*, liv. iii. ch. v.; Hautefeuille, *Des Nations Neutres*, tit. x.; Zouch, *Juris et Juridici Fecialis*, p. ii. § 8; Bello, *Derecho Internacional*, pt. ii. cap. viii. § 1; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. xiv.

From the earliest time Great Britain had claimed and exercised the right of seizing an enemy's goods under whatever flag they might be found, and that right had been unquestioned in England. Lord Mansfield, when appealed to by that Government in 1756, laid down the following principles: 1. The goods of an enemy on board the ships of a friend might be taken. 2. The lawful goods of a friend on board the ships of an enemy ought to be restored. 3. Contraband goods going to an enemy, although the property of a friend, might be taken as prize.

In 1780, when the armed neutrality was formed by the Empress Catherine of Russia, England again declined to abandon these principles; and within fifteen years every nation who had joined it, as soon as it touched its interests, abandoned it. In 1801, when there was the armed confederacy, England laid an embargo on the property of each of the countries forming that league. Letters of marque were issued, and in six months the whole confederacy was at an end. Lord Eldon held that the right of searching neutral vessels originated in the right of nature, and that no convention or treaty could destroy that right. Lord Stowell held that 'a war and a commercial peace is a state of things not yet seen in the world; there is no such thing as a war for arms and a peace for commerce; and the right of visiting and searching merchantmen on the high seas, whatever be the cargoes, whatever the destination, is the incontestable right of the lawfully commissioned cruisers of a belligerent State.'

Neutral goods in enemy's vessels

§ 7. Another question, usually discussed in connection with the carrying of enemy's goods in neutral ships, is that of transporting neutral goods in enemy's ship. On this question we quote some of the remarks of Wheaton. 'Although,' he says, 'by the general usage of nations, independently of treaty stipulations, the goods of an enemy found on board the ships of a friend are liable to capture and condemnation; yet the converse rule, which subjects to confiscation the goods of

Lord Nelson, in the House of Lords in 1801, stigmatised the maxim, 'free ships free goods,' as 'a proposition so monstrous in itself, so contrary to the law of nations, so injurious to the maritime interests of this country, that if it had been persisted in we ought not to have concluded the war with those powers while a single man, a single shilling, or even a single drop of blood remained in the country.' Buonaparte, on the same subject, said 'the greatest blow that could be given to England would be to compel her to give up her maritime rights.'

The rule was that a neutral should not be allowed to feed the resources of one belligerent as against another. Enemy's goods, as well as contraband of war, should be seized whenever found on a neutral vessel. The neutral vessel was not seized, but was detained, and after adjudication in a prize court was not only released, but the owners were paid the freight to which they would have been entitled had they taken the goods to their destination, and in some instances demurrage was allowed as well. This was never disputed till Frederick the Great refused to satisfy the English claims after the cession of Silesia, and then for the first time the new principle, 'free ships free goods,' was put forward, but was resisted, and the claims were paid. Next, the Prussian Commission was appointed to alter the old maritime rules, and establish other rules more favourable to Prussian interests. The memorials which were issued by this Commission were answered by the able letter of the Duke of Newcastle, and by the report which Lord Mansfield assisted in drawing up, and nothing more was heard of the new doctrine until the armed neutrality of 1780. By a decree of the National Convention of May 9, 1793, 'enemy's goods on board neutral vessels' were declared good prize, the neutral ships being released and freight paid by the captors. On February 8, 1793, Russia renounced her treaty of 1786 with France, declaring that the principle, 'free ships free goods,' should be 'no longer obligatory until the restoration of order in France.' In the same year Russia renewed with England her treaty of 1776, stipulating that neutral commerce should be carried on 'according to the principles and rules of the law of nations generally recognised,' and further, engaged to prevent neutrals from giving, on that occasion of common concern to every State, any protection whatever, directly or indirectly, in consequence of their neutrality, to the commerce or property of the French on the sea or in the ports of France. A similar article was inserted in the treaty of the same year between Great Britain and Spain, between Great Britain and Russia, and between Great Britain and the Emperor. These powers all re-affirmed the old rule. The new rule was abandoned by Sweden in 1788, and by Russia, France, Spain, Prussia, and by the Emperor. In 1809 Russia declared that ships laden in part with goods of the manufacture or produce of hostile countries should be stopped, and such merchandise confiscated and sold by auction for the profit of the crown, and if the merchandise composed more than half the cargo, not only the cargo, but also the ship should be confiscated.

a friend on board the vessels of an enemy, is manifestly contrary to reason and justice. It may, indeed, afford, as Grotius has stated, a presumption that the goods are enemy's property; but it is such a presumption as will readily yield to contrary proof, and not of that class of presumptions which the civilians call *presumptiones juris et de jure*, and which are conclusive upon the party. But, however unreasonable and unjust this maxim may be, it has been incorporated into the prize codes of certain nations, and enforced by them at different periods. The rule cannot be defended on sound principles, and is now admitted only when established by special compact, as an equivalent for the converse maxim, that *free ships make free goods*. This relaxation of belligerent pretensions may be fairly coupled with a correspondent concession by the neutral, that *enemy ships should make enemy goods*.[1]

Maxims of 'free ships free goods' and 'enemy ships enemy goods'

§ 8. The same author then proceeds to show that these two maxims are not only not inseparable, but have no natural connection. 'The primitive law,' he says, 'independently of international compact, rests on the simple principle that war gives a right to capture the goods of an enemy, but gives no right to capture the goods of a friend. The right to capture an enemy's property has no limit but of the *place* where the goods are found, which, if neutral, will protect them from capture. We have already seen that a neutral vessel on the high seas is *not* such a place. The exemption of neutral property from capture has no other exceptions than those arising from the carrying of contraband, breach of blockade, and other analogous cases where the conduct of the neutral gives to the belligerent a right to treat his property as enemy's property. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property. States have changed this simple and neutral principle of the law of nations by mutual compact, in whole or in part, according as they believed it to be for their interest; but the one maxim, that *free ships make free goods*, does not necessarily imply the converse proposition, that *enemy ships make enemy goods*. The

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 21; the 'Atalanta,' 3 *Wheat. R.*, 409; the 'London Packet,' 5 *Wheat. R.*, 132; the 'Amiable Isabella,' 6 *Wheat. R.*, 1.

stipulation that neutral bottoms shall make neutral goods is a concession made by the belligerent to the neutral, and gives to the neutral a capacity not given to it by the primitive law of nations. On the other hand, the stipulation subjecting neutral property, found in the vessel of an enemy, to confiscation as prize of war, is a concession made by the neutral to the belligerent, and takes from the neutral a privilege he possessed under the pre-existing law of nations; but neither reason nor usage renders the two concessions so indissoluble, that the one cannot exist without the other. It was upon these grounds that the Supreme Court of the United States determined that the Treaty of 1795, between them and Spain, which stipulates that free ships shall make free goods, did not necessarily imply the converse proposition that enemy ships make enemy goods, the treaty being silent as to the latter; and consequently that the goods of a Spanish subject found on board the vessel of an enemy of the United States were not liable to confiscation as prize of war.'[1]

The two maxims distinct

§ 9. Although the United States, by their judicial tribunals and executive department, have recognised the right of capturing enemy's goods in neutral vessels as a subsisting right under the law of nations, independently of conventional arrangements, they have always endeavoured to incorporate the privilege of *free ships free goods* in their treaties, and advocated its adoption as a rule of international jurisprudence. It was incorporated in their treaties with France in 1778 and 1800, with the United Provinces in 1782, with Sweden in 1783, 1816, and 1827; with Prussia in 1785 and 1828, and with Spain in 1795; this last was modified in 1819 to the effect that the flag of the neutral should cover the property of the enemy only when his own Government recognised the principle. The rule, thus modified, was applied to their treaties with Columbia in 1824, with Brazil in 1828, with Chili in 1832, with Mexico in 1831, &c. &c. In no case have they concluded any treaty sustaining a different principle, except that of 1794, with England. They have invariably opposed the rule that *enemy ships make enemy goods*,

[1] The 'Nereide,' 9 *Cranch. R.*, 388; Ortolan, *Diplomatie de la Mer*, tome ii. ch. v.; Bello, *Derecho Internacional*, pt. ii. cap. viii. § 2; Heffter, *Droit International*, §§ 163, 164; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. xiv.; Hautefeuille, *Des Nations Neutres*, tit. xv.; De Cussy, *Droit Maritime*, liv. i. tit. iii. § 10.

and their Supreme Court, as has already been stated, refused to admit it, even against a neutral whose law of prize would subject the property of American citizens to condemnation when found on board the vessels of her enemy.[1]

Treaties and ordinances

§ 10. Prior to the war between the Allies and Russia, 1854, and the Congress of Paris, 1856, the conventional law with respect to these two maxims has varied at different periods, according to the fluctuating policy and interests of the different maritime powers of Europe. It has been much more flexible than the consuetudinary law, but there has been a decided preponderance of modern treaties in favour of the maxim of *free ships free goods*, sometimes connected with that of *enemy ships enemy goods*, although the constant tendency has been to exclude the latter. France is almost the only Government which has maintained that the goods of a friend laden on board of the ships of an enemy are good and lawful prize. This principle was incorporated into the French ordinances of 1538, 1543, and 1584. The contrary was provided in the declaration of 1650, but the former rule was re-established in 1681. In the numerous French ordinances and treaties after that period, France generally contended for the same principle, sometimes with, and sometimes without, the converse maxim of *free ships free goods*. In her earlier treaties England adopted this last maxim, although she has

[1] *U. S. Statutes at Large*, vol. viii. pp. 262, 312, 393, 437, 472, 490.

It was decided by the Supreme Court of the United States, in 1815, that the stipulation in a treaty 'that free ships shall make free goods' does not imply the converse proposition that 'enemy ships shall make enemy goods;' that the rule of retaliation is not a rule of the law of nations; it is true that States may resort to retaliation as a means of coercing justice from the other party, but it is an act of policy, not of law; that a neutral may lawfully employ an armed belligerent vessel to transport his goods, and such goods do not lose their neutral character by the armament, nor by the resistance made by such vessel, provided the neutral do not aid in such armament or resistance, although he charter the whole vessel, and be on board at the time of the resistance. Mr. Justice Story differed from the opinion of the Court, and declared that in his judgment the act of sailing under a belligerent or neutral convoy is of itself a violation of neutrality, and that the ship and cargo, if caught *in delicto*, are justly confiscable; that it might with as much propriety be maintained that neutral goods, guarded by a hostile army in their passage through a country, for the avowed purpose of evading municipal rights, should not in case of capture be lawful plunder. (The 'Nereide,' 9 *Cranch.*, 388.)

The privilege of 'free ship free goods,' under the Dutch treaty, was held to protect the cargo of a Dutch ship going from one enemy port to another enemy port. (The 'Catherine Joanna,' 6 *Rob.*, 42, n.)

since most strenuously opposed it, and her tribunals have uniformly condemned all enemy goods in neutral vessels, while neutral goods in enemy vessels have, as a general rule, been exempted from confiscation. While the other nations of Europe have adopted the same principle as the rule of international law, they have generally, both in their ordinances and treaties, shown a willingness to adopt the maxim of *free ships free goods*.[1]

France and England as allies in 1854

§ 11. At the beginning of the war of 1854 between the Allies and Russia, the different constructions put upon the law of nations by England and France, with respect to the maxims of *free ships free goods*, and *enemy ships enemy goods*, threatened to aggravate the difficulties to which war always subjects neutral commerce. Neutral property, which England would not condemn for being found in an enemy's vessel, would be good prize to the French cruiser; while the neutral ship, whose flag would protect, against France, enemy's property on board, might be sent by an English cruiser into an English port, her voyage broken up, and her cargo condemned, with no allowance for freight or damages. A compromise of principles was therefore necessary to the co-operation of their navies. A Declaration was accordingly agreed upon by the two Powers, in April, 1854, 'waiving the rights of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war,' and of 'confiscating neutral property, not being contraband of war, found on board enemy's ships.'[2] Nevertheless, the arrangement was, upon its face, only for the war, and was declared to be a temporary waiving of belligerent rights recognised by the law of nations. Either party might, at the close of that war, have resumed the belligerent rights, the exercise of which was thus merely 'waived.'

[1] Flassan, *De la Diplomatie*, tome ii. pt. ccxxvi., tome iii. p. 451, tome vii. pp. 183, 273; Dumont, *Corps Diplomatique*, tome vi. pt. i. p. 342; Hautefeuille, *Des Nations Neutres*, tome iii. p. 270; Martens, *Recueil de Traités*, tome v. p. 530; the 'Citade de Lisboa,' 6 *Rob.*, 358; the 'Erstern,' 2 *Dallas R.*, 34; the 'Mariana,' 5 *Rob.*, 28.

[2] The declaration was as follows:—

'Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

'To preserve the commerce of neutrals from all unnecessary obstruction, her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations.

'It is impossible for her Majesty to forego the exercise of her right of

§ 12. All fears of such a result, however, were removed by the Declaration of the Congress of Paris, April 16, 1856, by the plenipotentiaries of Great Britain, France, Russia, Austria, Prussia, Sardinia, and Turkey, which has since been accepted in its entirety by all civilised States, with the exception of the United States, Spain, Mexico, and Venezuela. The second and third articles of this Declaration are as follows: '2nd. The neutral flag covers enemy's goods, with the exception of contraband of war.' '3rd. Neutral goods, with the exception of contraband of war,[1] are not liable to capture under an enemy's flag.' It was also provided that 'the present declaration is not, and shall not be binding, except between those powers who have acceded or shall accede to it.' The second and third articles of the Declaration of the Congress of Paris have been formally approved by the United States, Spain, and Mexico. Nevertheless, as the principle must be regarded as established by a conventional agreement, rather than by the general law of nations, it is binding only upon those who have acceded or may accede to it; but there is very little probability that any nation will hereafter attempt to enforce rules of maritime capture in conflict with the principle thus established by the great powers of Europe.[2]

Declaration of the Congress of Paris, 1856

seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches, and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbours, or coasts.

'But her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.

'It is not her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemy's ships; and her Majesty further declares that, being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organised forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers.—Westminster, March 28, 1854.'

[1] The declaration of Paris cannot be said to affect the question of visitation and search, for it expressly excepts contraband of war, and contraband can only be ascertained by searching a vessel.

It is doubtful whether neutral goods (not contraband of war) found on board an enemy's ship of war, privateer, or merchantman, carrying letters of marque and reprisal, are not a good prize, notwithstanding the Declaration of Paris; for it is a breach of neutrality to make such shipments.

[2] More than a year prior to this declaration, the President of the United States had submitted, not only to the powers represented in the Congress of Paris, but to all other maritime nations, two propositions which were substantially the same as those adopted, viz.: '1. That free ships make free goods—that is to say, that the effects or goods belonging

Proof of neutral goods in enemy's ships

§ 13. It is an established rule of the law of prize, that all goods found in an enemy's ship are presumed to be enemy's property—*res in hostium navibus præsumuntur esse hostium, donec probetur.* The evidence required to repel this presumption depends upon the particular character of the case. If the character of the ship is certainly hostile, the neutral character of the goods must be shown by documents on board at the time of capture. If these are insufficient, further proof is never allowed, and the penalty of forfeiture attaches as a matter of course. 'It has been truly observed,' says Duer, 'that any other course would subject the prize tribunals to endless impositions and frauds, and enable the enemy, thus obtaining the benefit of other proof, to evade, by supplying the documentary evidence, the just rights of the captor.' Although it is the duty, in all cases, of a neutral claimant to establish his claim by positive evidence, it is only when the character of the ship is certainly hostile that the presumption of the hostility of the goods cannot be refuted by evidence additional to the documents found on the ship. In other cases a reasonable time is allowed for the production of further proof, and it is only upon the failure to produce such proof, or its unsatisfactory nature when produced, that the court proceeds to a condemnation.[1]

Neutral ships under enemy's flag and pass

§ 14. Another violation of neutral duty is the use of the flag and pass of the enemy. A neutral vessel is bound by the character which she has thus assumed, and the owner is not allowed to contradict his own acts, and to redeem his vessel from condemnation, by a disclaimer of the hostile character which, with a view to his own interests, or those of the enemy, he has elected she should bear. 'If a neutral vessel,' says Kent, 'enjoys the privileges of a foreign character, she must expect, at the same time, to be subject to the inconveniences attaching to that character.' But, as already stated, the foreign character thus assumed is conclusive only as *against* the owner, and not *in his favour*, for

to subjects or citizens of a power or State at war are free from capture and confiscation when found on board of neutral vessels, with the exception of articles contraband of war. 2. That the property of neutrals on board an enemy's vessel is not subject to confiscation, unless the same be contraband of war.'

[1] Duer, *On Insurance*, vol. i. pp. 534, 535; the 'Flying Fish,' 2 *Gallis R.*, 374; the 'London Packet,' 1 *Mason R.*, 14.

the real character of the vessel may always be pleaded against her, where the knowledge of that fact would justify a condemnation. The first branch of the rule is intended as a penalty for violation of neutral duty.[1]

Neutral goods in such vessels

§ 15. But while the belligerent flag and pass are, in all cases, decisive, as to the owners, of the character of the ship, a distinction is made by the English courts in favour of the cargo of such ships, if the shipment were made in time of peace and plainly not in contemplation of war. Even where the goods themselves, for purposes having no relation to a future war, are clothed with a foreign character, now become hostile, the owner is not concluded, but is permitted to disprove the colourable title, and, upon due proof of his neutral character and actual ownership, his property is restored. On this subject we copy the remarks of Sir W. Scott. 'Some countries have gone so far as to make the flag and pass of the ship conclusive on the cargo also; but this country has never carried the principle to that extent. It holds the ship bound by the character imposed upon it by the authority of the government from which all the documents issue. But goods which have no such dependence upon the authority of the State may be differently considered.[2]

Neutral vessel in enemy's service

§ 16. If a neutral vessel is captured while in the employment of the enemy or his officers, for purposes immediately or mediately connected with the operations of the war, the owner is never permitted to assert his claim. The nature of the service or employment is very justly deemed, in such a case, conclusive evidence of its hostile character. While thus employed the neutral vessel is as truly a vessel of the enemy as if she were such by documentary title; and the owner is not allowed, for his own protection, to divest her of the character which she has thus assumed. Nor will the prize court listen to the plea that the vessel was impressed into such service by duress and violence. The answer of Sir Wm. Scott to such a defence, is most conclusive. When threats or force

[1] The 'Francis,' 8 *Cranch. R.*, 418; the 'Success,' 1 *Dod. R.*, 131; the 'Fortuna,' 1 *Dod. R.*, 87.

[2] The 'Elizabeth,' 5 *Rob.*, 5, n.; see also the 'Julia,' 1 *Gallis R.*, 605; the 'Aurora,' 8 *Cranch. R.*, 203; the 'Hiram,' 8 *Cranch. R.*, 444; the 'Ariadne,' 2 *Wheat. R.*, 143; the 'Caledonia,' 4 *Wheat. R.*, 100.

A neutral flag cannot protect an enemy's ship, although it may the cargo. ('Citade de Lisboa,' 6 *Rob.*, 358.)

are employed for such a purpose by a belligerent, it is the duty of a neutral master, who has no means of resistance, to surrender his vessel as a hostile seizure. He has no right, retaining his command, to navigate his vessel as a neutral, in the service and subject to the orders of the enemy. If he surrenders his vessel as a hostile seizure, he may appeal to his government for redress; but if he retain the command he will be treated as an enemy, and his vessel as the property of the belligerent.

Transporting military persons

§ 17. So, also, if the owner of a neutral ship has suffered his vessel to be employed in transporting military or naval persons or military stores for the enemy, the vessel and cargo are condemned.[1] Nor in such cases is it held necessary that the privity of the master, or his owners, be shown; it is sufficient that the employment be proven; no plea of ignorance or imposition is received. Where imposition is practised to entrap a neutral vessel into a hostile service, it operates as force, and redress in the way of indemnification must be sought against those who, by imposition or deceit, exposed the property to capture. A different rule would afford impunity to such conveyance, as it would generally be impossible to prove the knowledge or privity of the master or owners. In the case of the transportation of ninety French mariners from Baltimore to Bordeaux, in a neutral vessel, it was contended that there was no proof that they were to be immediately employed in military service. This distinction was discarded by the prize court. It was enough, said Sir Wm. Scott, that they were military persons, and that their transportation was the act of their government. It was not the mere fact of carrying military persons, but the fact of the vessel letting herself out, in a distinct manner, under a contract, for that purpose. If a military officer were going merely as an ordinary passenger, or other passenger, and at his own expense, neither that, nor any other British tribunal, had ever laid down the principle to the extent of condemning a vessel for such transportation.[2]

§ 18. A neutral vessel fraudulently carrying the despatches

[1] The 'Carolina,' 4 *Rob. R.*, 256; the 'Orozembo,' 6 *Rob. R.*, 433.

[2] Ortolan, *Diplomatie de la Mer*, tome ii. ch. vi.; the 'Friendship,' 6 *Rob.*, 420; Phillimore, *On Int. Law*, vol. iii. § 272; the 'Caroline,' 4 *Rob*, 256; the 'Commercen,' 1 *Wheat. R.*, 391.

of an enemy, is, as a general rule, liable to condemnation.[1] Public despatches are defined to embrace all official communications of public officers relating to public affairs. 'The

Conveying enemy's despatches

[1] Sir William Scott decided that the fraudulent carrying of despatches of the enemy by a neutral is a criminal act which will lead to the condemnation of the neutral vessel. (The 'Atalanta,' 6 *Rob.*, 458.) The gist of the offence appears to be the *fraudulent* carriage of despatches relating to a pending war by a neutral for the purpose of assisting a belligerent; but culpable negligence of the master has been held to constitute the offence. (The 'Susan,' 6 *Rob.*, 461.) Papers may lawfully be carried by a neutral vessel from a hostile port to a consul of the enemy residing in a neutral country, or may be carried to a port which, during the transit, has ceased to belong to the enemy (the 'Trende Sostre,' 6 *Rob.*, 457); or they may be purely commercial (the 'Hope,' 6 *Rob.*, 390, n. *a*); or deceit may have been practised on the neutral ship (the 'Lisette,' 6 *Rob.*, 457). Wheaton, in his adoption of the doctrine laid down in the case of the 'Atalanta,' seems to limit its force to acts fraudulent and hostile in their nature (*Wheat. on Captures*, ch. 6, § 10). Sir W. Scott interprets 'despatches,' treated of in the decisions as warlike or contraband communications, to be *official communications of official persons, on the public affairs of the government.* (The 'Caroline,' 6 *Rob.*, 465.) The cases to which he refers and from which that definition was deduced were essentially of that character, and moreover generally contained some marked element of fraud, culpable concealment or duplicity, or evasive subterfuge. (*Ibid.* 461, note.) The 'Madison' (*Edw.*, 225) indicates clearly that the court only regards as criminal in a neutral vessel the carrying of letters or despatches of a public nature from or to a belligerent port. The like tone of sentiment prevails in like cases with the same eminent judge, and he manifests a strong disposition to exonerate a vessel from responsibility, for transporting private letters between individuals, and, in the absence of proof to the contrary, to presume they were of an innocent kind. (The 'Acteon' 2 *Dods.*, 53.) A British ship and cargo were captured in Hampton Roads, near Fortress Monroe, by the United States during the Civil War, 1861. The libel alleged the transmission of despatches on board that ship to persons in Virginia, but the evidence, supported by the sworn protest of the master, merely proved that a small box was put ashore, at the mouth of the Rappahannock, by the master, containing some newspapers and a letter directed to his wife, who resided at Richmond. The court refused to presume that the letter was of a contraband nature or conduced to compromise the neutral character of the vessel, and ordered restitution of the vessel. (The 'Tropic Wind,' *Blatchf. Pr. Cas.*, 64.) In the 'Rapid' (*Edw.*, 228) Sir W. Scott observes that he would certainly be extremely unwilling to incur the imputation of imposing any restrictions upon the correspondence which neutral nations are entitled to maintain with the enemy, or to lay down a rule which would in effect deter masters of vessels from receiving on board any private letters, as they cannot know what they may contain. If a master is taking his departure from a hostile port in a hostile country, and still more so if the letters which are brought to him are addressed to persons resident in a hostile country, he is called upon to exercise the utmost jealousy. On the other hand, where the commencement of the voyage is in a neutral country, and is to terminate at a neutral port, or at a port to which, though not neutral, an open trade is allowed, in such a case there is less to excite his vigilance. With regard to an allegation against the American minister, Sir W. Scott also observes that he cannot bring himself to believe that the accredited minister of a

carrying of two or three cargoes of stores,' says Kent, abbreviating the language of Sir Wm. Scott, 'is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of campaign, and it may lead to a defeat of all the projects of the other belligerent in that theatre of the war. The appropriate remedy for this offence is the confiscation of the ship; and in doing so, the courts make no innovation on the ancient law, but they only apply established principles to new combinations of circumstances. There would be no penalty in the mere confiscation of the despatches. The proper and efficient remedy is the confiscation of the vehicle employed to carry them; and if any privity subsists between the owners of the cargo and the master, they are involved by implication in his delinquency. If the cargo be the property of the proprietor of the ship, then, by the general rule, *ob continentiam delicti*, the cargo shares the same fate, and especially if there was an active interposition in the service of the enemy, concerted and continued in fraud.' The mere fact that such despatches were found on board a neutral vessel is not sufficient to produce her condemnation; for the rule refers to a *fraudulent* carrying of the despatches of the enemy, and it is presumed that it would not apply to regular postal packets, whose mails, by international conventions, are distributed throughout the civilised world; nor even to merchant vessels which, in some countries, are obliged to receive letters and mail matter sent to them from the post offices. The master must necessarily be ignorant of the contents of the letters so received, and, in

country in amity with England would so far lend himself to the purposes of the enemy as to be the private instrument of conveying the despatches of the enemy's government to their agent.

In 1780 private negotiations were opened between persons in Holland and in the then North American colonies of Great Britain on the subject of a free commercial intercourse between those countries. Mr. Henry Laurens was sent as Minister Plenipotentiary to Holland on board an American packet, with important papers showing a plan of alliance between those countries. The packet was stopped, and Laurens and the papers brought to England, where he was charged with high treason. (Knight's *Hist. of England*, vol. v. p. 437.)

In 1810 Lucien Bonaparte was detained as a prisoner of war by a British ship of war at Cagliari, in Sardinia. The claim of territory was not advanced by the Sardinian Government, which was allied with Great Britain against France. Lucien Bonaparte was at the time of his arrest on board an American vessel bound for Philadelphia. The fact of the nationality of the vessel was not argued as a ground of exemption.

the absence of all suspicion of *fraud*, or of interposition in the service of the enemy, the mere carrying of an enemy's despatches, under such circumstances, could hardly be regarded as a delinquency under the law of nations, and a violation of neutral duty. The case is very different where the neutral vessel is employed by the belligerent for that purpose, or carries them fraudulently, and in the service used for the benefit of a belligerent. Another important exception to this rule is the conveyance of the despatches of an ambassador, or of any other public minister of the enemy, resident in a neutral State. In the language of Sir Wm. Scott, in the case of the 'Caroline,' 'they are despatches from persons who are, in a peculiar manner, the favourite objects of the protection of the law of nations, residing in the neutral country for the purpose of preserving the relations of amity between that State and their own government. On this ground a very material distinction arises, with respect to the right of furnishing the conveyance. The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility against you. The limits assigned to the operations of war against ambassadors, by writers on public law, are, that the belligerent may exercise his right of war against them, wherever the character of hostility exists; he may stop the ambassador of his enemy on his passage; but when he has arrived in the neutral country, and taken on himself the functions of his office, and has been admitted in his representative character, he becomes a *middle man*, entitled to peculiar privileges, as set apart for the preservation of the relations of amity and peace, in maintaining which all nations are, in some degree, interested.' . . . 'The practice of nations has allowed to neutral States the privilege of receiving ministers from the belligerent powers, and of an immediate negotiation with them.'

The case of the 'Trent'

§ 19. In 1861, during the American Civil War, an English steamer, the 'Trent,' left Havanna with her Majesty's mails for England, having on board numerous passengers. Shortly after noon on the following day, a steamer, being the 'San Jacinto,' having the appearance of a man-of-war, but not showing colours, was observed ahead. On nearing her she

fired a round shot from her pivot gun across the bows of the 'Trent,' and showed American colours. A shell was also discharged. The 'Trent' stopped and an officer with a large armed guard of marines boarded her. The officer demanded a list of the passengers, and compliance with this demand being refused, the officer said he had orders to arrest Messrs. Mason and Slidell and two others, naming them, and that he had sure information of their being passengers in the 'Trent.' The commander of the 'Trent' and a commissioned officer of her Majesty's navy, acting on behalf of the Postmaster-General, and in charge of the mails, protested against the act of taking by force, out of the vessel, four passengers under the protection of the British flag. Resistance was out of the question, and the four passengers were forcibly taken out of the ship. It was further demanded that the commander of the 'Trent' should proceed on board the steamer, but he refused to do so unless forcibly compelled, and the demand was not insisted on. These four persons were forcibly taken from on board a British vessel, the ship of a neutral power, while pursuing a lawful voyage.[1]

The Government of the United States declared that Captain Wilkes, in executing the proceeding in question, acted without the instruction or foreknowledge of that government; that although a round shot was fired, it was so pointed as to be as harmless as a blank shot; that the commander of the 'Trent' was not required to go on board the 'San Jacinto;' that the persons taken bore pretended credentials and instructions, in law known as despatches; and that the officers of the 'Trent' knew of the assumed characters and purposes of the four persons when they embarked on the vessel.

These persons were subsequently released by the United States Government to the British Government, but the arrest raised the very important question, viz. whether or not the persons arrested were 'contraband of war.' It was contended by the United States that maritime law so generally deals *in rem*—that is, *with property*—and so seldom with persons, that although it seems a straining of the term 'contraband' to apply it to them, nevertheless, persons, as well as property, may become contraband, since the word means broadly

[1] Historicus, *Letters on International Law*, pp. 187 198; the 'Trent,' *Parl. Papers*, 1862, vol. lxii.

'contrary to proclamation, prohibited, illegal, unlawful;' that all writers and judges pronounce naval or military persons in the service of the enemy contraband; that Vattel says, 'war allows us to cut off from an enemy all his resources, and to hinder him from sending ministers to solicit assistance;' that Sir William Scott says, in the case of the 'Caroline' (6 *Rob.*, 468), 'you may stop the ambassador of your enemy on his passage,' that despatches are not less clearly contraband, and the bearers or couriers who undertake to carry them fall under the same condemnation. The United States acknowledged that a subtlety might be raised whether pretended ministers of an usurping power, not recognised as legal by either the belligerent or the neutral, could be held to be contraband, but that it would disappear on being subjected to what is the true test in all cases, namely, the spirit of the law; that Sir William Scott, speaking of civil magistrates who were arrested and detained as contraband, says, 'It appears to me on principle to be but reasonable that, when it is of sufficient importance to the enemy that such persons shall be sent out on the public service at the public expense, it should afford equal ground of forfeiture against the vessel that may be let out for a purpose so intimately connected with the hostile operations.'

On the other hand the British Government relied on the grounds, that the general right and duty of a neutral power to maintain its own communications and friendly relations with both belligerents cannot be disputed. 'A neutral nation,' says Vattel, 'continues, with the two parties at war, in the several relations nature has placed between nations. It is ready to perform towards both of them all the duties of humanity, reciprocally due from nation to nation.' For the performance of these duties, on both sides, the neutral nation has itself a most direct and material interest; especially when it has numerous citizens resident in the territories of both belligerents; and when its citizens, resident both there and at home, have property of great value in the territories of the belligerents, which may be exposed to danger from acts of confiscation and violence if the protection of their own government should be withheld.[1]

[1] This was the case with respect to British subjects during the late civil war in North America.

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The principle of contraband of war is here clearly explained, and it is impossible that men, or despatches, which do not come within that principle, can in this sense be contraband. The penalty of knowingly carrying contraband of war is, as Mr. Seward stated, nothing less than the confiscation of the ship; but it is impossible that this penalty can be incurred when the neutral has done no more than employ means, usual among nations, for maintaining his own proper relations with one of the belligerents. It is of the very essence of the definition of contraband that the articles

nor entitled to diplomatic honours. Upon this footing Messrs. Mason and Slidell, who were expressly stated by Mr. Seward to have been sent as pretended ministers plenipotentiary from the Southern States to the Courts of St. James and of Paris, must have been sent, and would have been, if at all, received; and the reception of these gentlemen upon this footing could not have been justly regarded, according to the law of nations, as a hostile or unfriendly act towards the United States. Nor, indeed, is it clear that these gentlemen would have been clothed with any powers, or have enjoyed any immunities, beyond those accorded to diplomatic agents, not officially recognised.

should have a hostile, and not a neutral, destination. 'Goods,' says Lord Stowell (the 'Imina,' 3 *Rob.*, 167), 'going to a 'neutral port cannot come under the discription of contraband, all goods going there being equally lawful.' 'The rule respecting contraband,' he adds, 'as I have always understood it, is, that articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port.' On what just principle can it be contended that a hostile destination is less necessary, or a neutral destination more noxious, for constituting a contraband character in the case of public agents or despatches, than in the case of arms and ammunition? Mr. Seward sought to support his conclusion on this point by a reference to the well-known dictum of Sir William Scott, in the case of the 'Caroline,' that 'you may stop the ambassador of your enemy on his passage,' and to another dictum of the same judge, in the case of the 'Orozembo' (6 *Rob.*, 434), that civil functionaries, 'if sent for a purpose intimately connected with the hostile operations,' may fall under the same rule with persons whose employment is directly military. These quotations seemed, to the British Government, to be irrelevant. The words of Sir W. Scott were in both cases applied by Mr. Seward in a sense different from that in which they were used.[1] It was further argued

[1] Sir William Scott does not say that an ambassador sent from a belligerent to a neutral State may be stopped as contraband, while on his passage on board a neutral vessel, belonging to that or any other neutral State; nor that, if he be not contraband, the other belligerent would have any right to stop him on any voyage. The sole object which Sir William Scott had in view was to explain the extent and limits of the doctrine of the inviolability of ambassadors, in virtue of that character, for he says: 'The limits that are assigned to the operations of war against them, by Vattel and other writers upon these subjects, are, that you may exercise your right of war against them wherever the character of hostility exists. You may stop the ambassador or your enemy on his passage; but when he has arrived, and has taken upon him the functions of his office, and has been admitted in his representative character, he becomes a sort of middle man, entitled to peculiar privileges, as set apart for the protection of the relations of amity and peace, in maintaining which all nations are in some degree interested.' There is certainly nothing in this passage from which an inference can be drawn so totally opposed to the general tenour of the whole judgment, as that an ambassador proceeding to the country to which he is sent, and on board a neutral vessel belonging to that country, can be stopped on the ground that the conveyance of such an ambassador is a breach of neutrality, which it must be if he be contraband of war. Sir W. Scott is here expressing, not his own opinion merely, but the doctrine which he considers to have been laid down by writers of authority upon the subject. No writer of authority has ever suggested that an ambassador proceeding to a neutral State on board one

by the United States Government that the 'Trent,' though she carried mails, was a contract, or merchant vessel, a common carrier for hire; that maritime law knows only three classes of vessels—viz. vessels of war, revenue vessels and merchant vessels—and that the 'Trent' falls within the latter class; that whatever disputes have existed concerning a right of visitation or search in time of peace, none, they supposed, had existed in modern times about the right of a belligerent in time of war to capture contraband in neutral and even friendly merchant vessels, and of the right of visitation and search in order to determine whether they are neutral and are documented as such according to the law of nations. They assumed in the case of the 'Trent,' according to their

of its merchant ships is contraband of war. The only writer named by Sir William Scott is Vattel (lib. iv. c. vii. § 85), whose words are these: 'On peut encore attaquer et arrêter ses gens (*i.e.* gens de l'ennemi), partout, où on a la liberté d'exercer des actes d'hostilité. Non seulement donc on peut justement refuser le passage aux ministres qu'un ennemi envoie à d'autres souverains; on les arrête même, s'ils entreprennent de passer secrètement et sans permission dans les lieux dont on est maître.' And he adds as an example the seizure of a French ambassador, when passing through the dominions of Hanover during war between England and France, by the King of England, who was also sovereign of Hanover.

The rule, therefore, to be collected from these authorities is, that you may stop an enemy's ambassador in any place of which you are yourself the master, or in any other place where you have a right to exercise acts of hostility. Your own territory, or ships of your own country, are places of which you are yourself the master. The enemy's territory or the enemy's ships are places in which you have a right to exercise acts of hostility. Neutral vessels, guilty of no violation of the laws of neutrality, are places where you have no right to exercise acts of hostility. It would be an inversion of the doctrine that ambassadors have peculiar privileges to argue that they are less protected than other men. The right conclusion is, that an ambassador sent to a neutral power is inviolable on the high seas as well as in neutral waters while under the protection of the neutral flag.

The other dictum of Sir William Scott, in the case of the 'Orozembo,' is even less pertinent to the present question. That related to the case of a neutral ship which, upon the effect of the evidence given on the trial, was held by the court to have been engaged as an enemy's transport to convey the enemy's military officers, and some of his civil officers, whose duties were intimately connected with military operations, from the enemy's country to one of the enemy's colonies, which was about to be the theatre of those operations, the whole being done under colour of a simulated neutral destination. But as long as a neutral government, within whose territory no military operations are carried on, adheres to its profession of neutrality, the duties of civil officers on a mission to that government and within its territory cannot possibly be 'connected with' any 'military operations' in the sense in which these words were used by Sir William Scott, as, indeed, is rendered quite clear by the passages already cited from his own judgment in the case of the 'Caroline.'

reading of British authorities, that the circumstance that the 'Trent' was proceeding from a neutral port to another neutral port did not modify the right of the belligerent captor. The reply of the British Government to this is that according to the law as laid down by British authorities, if the real destination of the vessel be hostile (that is, to the enemy of the enemy's country), it cannot be covered and rendered innocent by a fictitious destination to a neutral port; but if the real terminus of the voyage be *bonâ fide* in a neutral territory, no English, nor, indeed, is it believed any American authority can be found which has ever given countenance to the doctrine that either men or despatches can be subject during such a voyage, and on board such a neutral vessel, to belligerent capture as contraband of war. The British Government regarded such a doctrine as wholly irreconcileable with the true principles of maritime law; and certainly with those principles as they have been understood in the courts of Great Britain. It is to be further observed that packets engaged in the postal service, and keeping up the regular and periodical communications between the different countries of Europe and America, and other parts of the world, though in the absence of treaty stipulations they may not be exempted from visit and search in time of war, nor from the penalties of any violation of neutrality, if proved to have been knowingly committed, are still, when sailing in the ordinary and innocent course of their legitimate employment, which consists in the conveyance of mails and passengers, entitled to peculiar favour and protection from all governments in whose service they are engaged. To detain, disturb, or interfere with them, without the very gravest cause, would be an act of a most noxious and injurious character, not only to a vast number and variety of individual and private interests, but to the public interests of neutral and friendly governments. If the American arguments were acted upon as sound, the most injurious consequences might follow. For instance, in the Civil War of 1861, according to that doctrine, any packet ship carrying a Confederate agent from Dover to Calais, or from Calais to Dover, might be captured and carried to New York. In case of a war between Austria and Italy, the conveyance of an Italian minister or agent might cause the capture of a neutral packet

plying between Malta and Marseilles, or between Malta and Gibraltar, the condemnation of the ship at Trieste, and the confinement of the minister or agent in an Austrian prison. So in the war of 1854 between Great Britain and France on the one hand, and Russia on the other, a Russian minister going from Hamburg to Washington, in an American ship, might have been brought to Portsmouth, the ship might have been condemned, and the minister sent to the Tower of London. So also a Confederate vessel of war might have captured a Cunard steamer on its way from Halifax to Liverpool, on the ground of its carrying despatches from Mr. Seward to Mr. Adams.[1]

Rules of 1756, 1793, and 1801

§ 20. If a neutral engages in a commerce which is exclusively confined to the subjects of another country, and which is interdicted to all others, so that it cannot be carried on at all in the name of a foreigner, such a commerce is considered so entirely national as to follow the situation of the country, and to impress its hostile character upon the property engaged in it. In the war of 1756, the French Government (enemy to Great Britain) allowed the Dutch, then neutral, to carry on the commerce between the mother country and her colonies, under special licenses granted for this particular purpose, other neutrals being excluded from the same trade. Dutch vessels so employed were captured by British cruisers, and, together with their cargoes, condemned by the British prize courts. In the opinion of these courts the vessels were to be considered like transports in the enemy's service, and the property as so completely identified with the enemy's

[1] In 1804 Mr. Madison, Secretary of State of the United States, in his instructions to Mr. Munroe, the American minister in England, says: 'Whenever property found in a neutral vessel is supposed to be liable on any ground to capture and condemnation, the rule in all cases is, that the question shall not be decided by the captor, but be carried before a legal tribunal, where a regular trial may be had, and where the captor himself is liable to damages for an abuse of his power. Can it be reasonable, then, or just, that a belligerent commander who is thus restricted, and thus responsible in a case of mere property, of trivial amount, should be permitted, without recurring to any tribunal whatever, to examine the crew of a neutral vessel, to decide the important question of their respective allegiance, and to carry that decision into execution by forcing every individual he may choose into a service abhorrent to his feelings, cutting him off from his most tender connections, exposing his mind and his person to the most humiliating discipline, and his life itself to the greatest dangers? Reason, justice, and humanity unite in protesting against so extravagant a proceeding.'

interests as to acquire a hostile character. The doctrine of these decisions has been frequently affirmed by the prize courts of England and America, and by the opinions of the most eminent text-writers of other countries. It has generally been designated by publicists as the 'rule of the war of 1756.'[1] Few now contest the correctness of this rule, viz. that where neutrals, by a special indulgence, are permitted, in time of war, to engage in a commerce of the enemy which is purely national, and from which they are excluded in time of peace, they are necessarily impressed with a hostile character. But during the wars of 1793 and 1801 Great Britain asserted that where a commerce, which had been previously regarded as a national monopoly, is thrown open in time of war to all nations, without reserve, by a general, and, on its face, a permanent regulation, neutrals have no right to avail themselves of the concession, but that their entrance into the trade thus opened is a criminal departure from the impartiality they are bound to observe. It was formerly the policy of the great European powers to confine exclusively to their ships and subjects the trade between their own ports, and between the mother country and its colonies; but, during the wars referred to, some of the Continental States abolished this monopoly, and opened their coasting and colonial trade to all nations without reserve.

Explication of them

§ 21. The general principle applied to cases of the interposition of neutral merchants in the colonial trade has been, that the 'fundamental maxim of the trade being founded on a system of monopolising to the parent State the whole trade *to* and *from* her colonies in time of peace, it is not competent to neutral States in time of war to assume that trade on particular indulgences, or on temporary relaxations arising from the state of war, and that such a trade is not therefore entitled to the privileges and protection of a neutral character.' The application of this general rule, however, has from time to time been qualified by some relaxations. It is upon the extent and legal effect of these, rather than on the existence or fitness of the general principle itself, that the various discussions which have taken place on these subjects have

[1] Phillimore, *On Int. Law*, vol. iii. §§ 214, 225; Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 27; Story, *Life of*, vol. i. p. 288; Brymer *v.* Atkyns, 1 *H. Black. Rep.*, p. 191; the 'Immanuel,' 2 *Rob.*, 186.

principally been employed. During the war between England and her American colonies and the several powers of Europe, that interfered to foment those differences, the principle was altogether intermitted—and on this ground, that France had professed, a short time before the commencement of hostilities, to have altogether abandoned the principle of monopoly, and meant, as a permanent regulation, to admit neutral merchants to trade with the French colonies in the West Indies. The event proved the falsehood of that representation; but, for a time, the effect was the same. The Court of Admiralty of Great Britain did not, during that war, apply the principle or interrupt the intercourse of neutral vessels in that branch of commerce more than in any other. Soon after the commencement of the war of 1793 the first set of instructions that issued were framed, not on the exception of the American war, but on the antecedent practice; and directed cruisers to 'bring in, for lawful adjudication, all vessels laden with goods, the produce of any colony of France, or carrying provisions or supplies for the use of any such colony.' The relaxations that have since been adopted have originated chiefly in the change that has taken place in the trade of that part of the world, since the establisment of an independent government on the continent of America. In consequence of that event, American vessels had been admitted to trade in some articles, and on certain conditions, with the colonies both of Great Britain and France. Such a permission had become a part of the general commercial arrangement, as the ordinary state of their trade in time of peace. The commerce of America was therefore abridged by the foregoing instructions, and debarred of the right generally ascribed to neutral trade in time of war, that it may be continued with particular exceptions on the basis of its ordinary establishment. In consequence of representations made by the American Government to this effect, new instructions to the British cruisers were issued on January 8, 1794, apparently designed to exempt American ships trading between their own country and the colonies of France. The directions were 'to bring in all vessels laden with goods, the produce of the French West India Islands, and coming directly from any port of the said islands to any port of Europe.' In consequence of this relaxation of the general principle, in favour

of American vessels, a similar liberty of resorting to the colonial market for the supply of their own consumption was conceded to the neutral States of Europe. To this effect a third set of public instructions was issued by Great Britain on January 25, 1798, which recited, as the special cause of further alteration, 'the present state of the commerce of this country, as well as that of neutral countries,' and directed cruisers 'to bring in all vessels coming with cargoes, the produce of any island or settlement belonging to France, Spain, or Holland, and coming directly from any port of the said islands or settlements to any port of Europe, not being a port of this kingdom, nor a port of the country to which such ships, being neutral ships, belonged.' Neutral vessels were, by this relaxation, allowed to carry on a direct commerce between the colony of the enemy and their own country; a concession rendered more reasonable by the events of war, which, by annihilating the trade of France, Spain, and Holland, had entirely deprived the States of Europe of the opportunity of supplying themselves with the articles of colonial produce in those markets. This is the sum of the general rule, and of the relaxations in the order in which they have occurred. On the effect and extent of the law, to be extracted from the rule and the exceptions taken together, much argument has been displayed and several important judgments have been delivered.[1]

[1] Duer, *On Insurance*, vol. i. pp. 699, 717; Wheaton, *Hist. Law of Nations*, pp. 373 et seq.; the 'Nancy,' 4 *Rob.*, Appen. vi.; *British Orders in Council*, November 6, 1793; January 8, 1794; February 25, 1798; Heffter, *Droit International*, § 174.

Pritchard's *Admiralty Digest* contains most of the judgments referred to in the text, but a note of the following cases may be of interest, viz. :—

A ship going from the mother country of the enemy to their colony under false papers and a false character, and coming back again to the mother country, was to be subject to confiscation by the other belligerent taking her, notwithstanding the clearest evidence of neutral property. (The 'Calypso,' 2 *Rob.*, 154; the 'Phœnix,' 3 *Rob.*, 186; the 'Star,' *ibid.* 193, n.)

Neutral property, passing in direct voyages between the mother country of one enemy and the colony of another enemy, was to be liable to condemnation. (The 'Rose,' 2 *Rob.*, 206.)

And this whether the trade was opened to the neutral by the enemy or not. (The 'Immanuel,' *ibid.* 205.)

A neutral ship and cargo, taken trading between the settlement of one enemy and the colonial possession of an allied enemy, was condemned, as included under the principle of a trade, between the colony of the

§ 22. The distinction between the rule of the war of 1756, and that contended for by Great Britain, generally known as enemy and the parent State, which was illegal. (The 'New Adventure,' and also the 'Oxolen' (Lords of Appeal), 4 *Rob.*, App. A, p. 4, note.) Distinction between them

Cargo on board a neutral ship, seized on a voyage from a colony of the enemy to the mother country, notwithstanding an asserted deviation from such destination, but under compulsion of a *vis major*, condemned. Ship restored, but without freight. (The 'Minerva,' 3 *Rob.*, 229, and the 'Anne Dorothea,' *ibid.* 229, n.) But the illegality of such voyages was subsequently held by the Lords of Appeal to attach as strongly on the ship as on the cargo, and the ship was condemned accordingly. (The 'Yonge Thomas,' 3 *Rob.*, 232, n.)

A neutral ship and cargo, taken going from a colony of the enemy to a port of Europe, not being a British port nor a port of the country to which either the ship or cargo belonged (which trade, though suggested by the claimant to have been, during peace, an open trade, the court held itself bound, under the general rule of maritime States, and in the absence of proof to the contrary by the claimant, to consider as an exclusive trade monopolised by the parent State), condemned on the ground of such trade being a breach of the general law of nations, and not within the limits of the relaxations of the general law allowed by the government of Great Britain. (The 'Wilhelmina' (Lords of Appeal), 4 *Rob.*, App.)

A neutral ship might lawfully go from her own port in Europe to the colony of an enemy, and there lade a cargo, and return with it to her own port. (The 'Providentia,' 2 *Rob.*, 142; the 'Immanuel,' *ibid.* 197; the 'Margaretha Magdalena,' *ibid.* 138.)

Goods were shipped at a neutral port for the colony of the enemy, but afterwards entered at a port of the enemy, where the ship had stopped, and where part of the cargo was taken out and sent back to the neutral port, similar goods being placed on board in lieu thereof. It was held (but as to that part only of the goods originally shipped) to be entitled, under the general prize law of nations, to be considered as exported direct from the neutral port, the original place of their shipment. (The 'Immanuel,' 2 *Rob.*, 197.)

An American vessel taken bringing a cargo of produce from the Havanna to Hamburg, merely touching in America for fresh papers, without landing the cargo or paying duties, condemned, as also the cargo, the touching in America being held to be a colourable and collusive and not a *bonâ fide* importation, and the voyage direct from the Havanna to Hamburg being illegal under the general law of nations. (The 'Mercury' (Lords of Appeal), 4 *Rob.*, App.)

The mere touching at an intermediate port, whether of the country to which the vessel belonged or any other, without importing the cargo into the common stock of that country, did not alter the nature of the voyage, which continued the same in all respects, and was considered as a voyage to the country to which the vessel was actually going for the purpose of delivering the cargo at the ultimate port. (The 'Maria,' 5 *Rob.*, 365.)

Perishable commodities, carried from the enemy's country to a neutral port, with a *bonâ fide* intention of disposing of them in that port, were permitted to be exported to the enemy's colonies, in consequence of their being unable to be sold as intended. Restitution of ship and cargo, with captor's expenses, decreed, reversing the decision of the Vice-Admiralty Court of New Providence, condemning ship and cargo by reason of such trading. (The 'John,' 1 *Acton*, 39.)

A plea of distress, set up to account for a neutral, trading from the colony of the enemy, putting into a port of the mother country, was held

the rule of 1793, is thus spoken of by Wheaton: 'There is all the difference between this principle and the more modern doctrine which interdicts to neutrals, during war, all trade not open to them in time of peace, that there is between the granting by the enemy of special licenses to the subjects of the opposite belligerent, protecting their property from capture in a particular trade which the policy of the enemy induces him to tolerate, and a general exemption of such trade from capture. The former is clearly cause of confiscation, whilst the latter has never been deemed to have such an effect. The rule of the war of 1756 was originally founded

on the facts not to amount to a sufficient excuse for so doing. Ship and cargo condemned accordingly. (The 'Star,' 3 *Rob.*, 193, n.)

The general principle was not so strictly applied to trade with the European settlements in the East, as in the New World, as the trade of the East had been generally open to neutrals. (The 'Juliana,' 4 *Rob.*, 328.)

Trade with the French colony of Senegal was held to have been sufficiently opened by the French to neutrals before the war, to exempt a vessel so trading from the operation of the principle applied to the colonial trade of the enemy, under which property taken in trade between the mother country and colony of the enemy was held liable to confiscation. Restitution; captor's expenses allowed. (*Ibid.*)

Neutrals were not to trade on freight between the ports of the enemy. Freight and expenses to a neutral ship engaged in the coasting trade of the enemy refused. (The 'Immanuel,' 1 *Rob.*, 302.)

In England and most other European countries, the coasting trade had not to the date of this case been open to foreign vessels. Habitual employment in the coasting trade of the enemy would stamp a neutral vessel with a hostile character, but pursuing one voyage in such trade would not be sufficient. (The 'Welvaart,' 1 *Rob.*, 124.)

See also the 'Atlas,' 3 *Rob.*, 299; the 'Fortuna,' 4 *Rob.*, 278; the 'Bremen Flügge,' *ibid.* 90; Darby *v.* the 'Erstern,' 2 *Dall.*, 34; the William,' 5 *Rob.*, 385; and the 'Stephen Hart,' *Blatchf. Prize Cases*, 387.

Carrying on the coasting trade of the enemy with false papers was a cause of condemnation. So held, notwithstanding the asserted declarations of France, holding out an assurance that foreign vessels should be admitted into the coasting trade of that country as a permanent regulation. (The 'Ebenezer,' 6 *Rob.*, 252.)

The privilege of 'free ships free goods' under the Dutch treaty was held to apply to coasting voyages. (The 'Yonge Jan,' and other ships, 6 *Rob.*, 42, n.)

For cases of condemnation of ships and cargoes on the ground of a trading, in violation of the prohibitory Act, with the American States, then colonies of, but in a state of revolt from, Great Britain, see the 'William and Grace,' and cases therein cited, *Hay and Marriott*, 76; the 'Belle Sauvage,' cited in the 'Friendship,' *ibid.* 79; the 'Sally,' *ibid.* 83.

For cases of restitution, notwithstanding such a trading and the statute, on the ground of peculiarly favourable circumstances applying to them, see the 'Friendship,' *ibid.* 78; the 'Commerce,' *ibid.* 80; the 'Rebecca,' *ibid.* 197.

As to insurances on a colonial or coasting trade, see Berens *v.* Rucker, 1 *Wm. Black.*, 314.

upon the former principle; it was suffered to lie dormant during the war of the American revolution, and, when revived at the commencement of the war against France, in 1793, was applied with various relaxations and modifications to the prohibition of all neutral traffic with the colonies, and upon the coasts of the enemy.' This distinction is also pointed out by Duer, who attempts to answer the arguments of Sir William Scott.[1]

Effect on American commerce of the rule of 1793

§ 23. The application of this rule of 1793, made by Great Britain, fully illustrates its character. As explained by the British courts of Admiralty, and relaxed by the Orders in Council, it permitted the importation of the produce of the enemy's colonies into a neutral country, and its exportation thence to other countries. A question, however, arose as to what constituted the evidence of importation and exportation by the neutral. An American vessel had imported goods from Havanna, which had been landed in the United States and duties on them paid to the American Government. They had afterwards been carried in the same vessel as a part of a cargo from a port of Massachusetts to Spain. The vessel was captured by British cruisers, and the captors insisted upon a condemnation on the ground of *continuity of voyage*; but Sir William Scott decreed the restoration of ship and cargo, on the ground that the landing of the goods and the payment of duties in a neutral port were sufficient evidence of an importation in good faith. This decision was rendered in 1800; but in 1805 the Lords of Appeal decided that these *criteria* of a *bonâ fide* importation might be fallacious, and therefore were not to be held as conclusive evidence of a breach in the voyage; if the circumstances of their re-exportation were such as to indicate that the original importation into the neutral port was intended for that purpose, the trade was illegal, and the vessels and cargoes were condemned.[2] The effect of this application of the British rule to the continuity of the voyage from an enemy's colony to a neutral port, and thence to the mother country, or to a port of a belligerent, produced a most disas-

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 27; Wheaton, *Hist. Law of Nations*, pp. 373 et seq.; Wheaton, *Rep.*, vol. i., Appendix No. iii. p. 506; Duer, *On Insurance*, vol. i. pp. 707-717; Sir William Temple's *Works*, p. 313.

[2] The 'Polly,' decided in 1800, 2 *Rob.*, 361; the 'Essex,' decided in 1805, 5 *Rob.*, 369; the 'William,' 5 *Rob.*, 387.

trous effect upon American commerce. The merchants of the United States, relying upon the rule, recognised by Sir William Scott, that the landing of the goods and the payment of the duties in the neutral port would be regarded as conclusive evidence that the continuity of the voyage had been broken so as to legalise a subsequent exportation (although the language of the judge did not fully warrant the inference), had engaged largely in trade with the colonies of France and Spain, re-exporting the same goods to European ports. When this trade had existed without interruption for some years, the unexpected decision of the Lords of Appeal on the continuity of the voyage caused the seizure and condemnation of a vast number of American ships and cargoes.[1]

Opinions of Story and of Phillimore

§ 24. Phillimore adopts Mr. Justice Story's opinion with respect to the rules of 1756 and 1793. This opinion was as follows: 1st, That the coasting trade of a nation being by its nature exclusively national, neutrals cannot engage in it, when thrown open during war; but that the British extension of this doctrine to cases where a neutral traded between ports of the enemy, with a cargo taken in at a neutral country, was unjust; and 2nd, with respect to colonial trade, that, if a neutral engage in trade between the mother country and the colony which is thrown open merely in war, he is liable, in most instances, to the same penalty. 'But,' continues Story, 'the British have extended this doctrine to all intercourse with the colony, even from or to a neutral country, and herein it seems to me, they have abused the rule. This, at present, appears to me to be the proper limits of the rule, as to the colonial and the coasting trade; and the rule of 1756 (as it was at that time applied) seems to me well founded; but its late extension is reprehensible.'[2]

Views of American Government

§ 25. The British extension of the rule of 1756 to the doctrine of 1793, and its subsequent application to the ruin of American commerce, drew from the Government of the United States an earnest and energetic remonstrance. From the grounds then assumed, with respect to the rule of 1793, there is no reason to believe that this government will ever depart.

[1] Duer, *On Insurance*, vol. i. pp. 719-725; Kent, *Com. on Am. Law*, vol. i. p. 85, note; the 'Maria,' 5 *Rob.*, 365.

[2] Phillimore, *On Int. Law*, vol. ii. §§ 215, 225; Story, *Life and Letters*, vol. i. pp. 287, 288.

They were taken on full deliberation, and maintained at the time with signal ability, and they have since been adopted by all her ablest statesmen and writers on public law. Some have boldly attacked the doctrine of 1756, as unsanctioned by the law of nations, but it has now become the settled conviction that its main principles, when properly limited and distinguished from that of 1793, are just and correct. At the same time the British rule is regarded as an innovation so unjust and ruinous to neutral commerce, that neutral States are bound to resist any new attempt to force its application. There is no doubt that the United States would now regard any attempt to apply it to American commerce as an act of direct and immediate hostility.[1]

Change of British colonial policy

§ 26. But there is very little probability that Great Britain will attempt to revive it in any future war, from the great change in British opinion on this subject, and more particularly from the changes which have since been made in the colonial system of the powers of Europe. The colonial trade of England being now open to the navigation of the world, the theory on which the restriction of 1793 was based necessarily falls to the ground. It is enacted by 39 and 40 Vict., c. 36 (re-enacting the provisions of former statutes), that all trade by sea from any one port of the United Kingdom to any other port thereof shall be deemed to be a coasting trade, and all ships while employed therein shall be deemed to be coasting ships, and no port of the United Kingdom, however situated with regard to any other port, shall be deemed in law with reference to each other to be ports beyond the seas (s. 140). Every foreign ship in the coasting trade is subject to the same laws, rules, and regulations to which British ships are subjected, and to no higher rates (s. 141). Every coasting ship is confined to the coasting voyage (s. 142). And by 32 Vict., c. 11 (1869), the legislature of a British possession may by Act or ordinance regulate its own coasting trade, subject to the provisions of this Act.

[1] Monroe, *Letter to Lord Mulgrave*, Sept. 23, 1805; Madison, *Letter to Monroe and Pinkney*, May 17, 1805; Wheaton, *Elem. Int. Law*, pt. iv. ch. iii. § 27; Wheaton, *Hist. Law of Nations*, pp. 374 et seq.; Wheaton, *Reports*, vol. i. Appendix, note iii. p. 506; Story, *Life and Letters*, vol. i. p. 287.

CHAPTER XXIX

PACIFIC INTERCOURSE OF BELLIGERENTS

1. Object and character of *commercia belli*—2. General compacts and conventions—3. Suspension of arms, truces and armistices—4. Authority to make them—5. Acts of individuals ignorant of their existence—6. What may be done during a truce—7. Conditional and special truces—8. Their interpretation—9. Renewal of hostilities—10. Capitulations—11. Individual promises—12. Passports and safe-conducts—13. When and how revoked—14. Their violation, how punished—15. Safeguards—16. Cartels for prisoners—17. Cartel ships—18. Their rights and duties—19. Ransom of prisoners of war—20. Ransom of captured property—21. In England—22. Ransom bill binding on allies—23. If ransomed vessel be lost or stranded—24. Recapture of ransomed vessel and ransom bill—25. Hostages for captures and prisoners—26. Suits on contracts of ransom—27. Flags of truce.

Object and character of commercia belli

§ 1. THE usage of civilised nations has introduced a certain friendly intercourse in war, technically called *commercia belli*, by which its violence may be allayed, so far as is consistent with its object and purpose, and a way be kept open which may lead, in time, to an adjustment of differences, and ultimately to peace. Were all pacific communications between armies absolutely cut off, war would not only become unnecessarily cruel and destructive, but there would be no chance of terminating it, short of the total annihilation of the belligerents. Grotius has devoted an entire chapter to prove, by the concurring testimony of all ages and all nations, that *good faith* should always be observed between enemies in war. Even Bynkershoek, who adopted sentiments respecting the rights of war now happily rejected by the whole civilised world, prohibits perfidy towards an enemy, 'not,' he says, 'because anything is unlawful towards an enemy, but because, when our faith has been pledged to him, so far as the promise extends, he ceases to be an enemy.' Vattel says that the faith of promises made to an enemy is absolutely

essential for the common safety of mankind, and is, therefore, held sacred by all civilised nations.[1]

Military compacts and conventions

§ 2. Belligerent States, and their armies and fleets, frequently have occasion, during the continuance of a war, to enter into agreements of various kinds; sometimes for a general or partial suspension of hostilities, for the capitulation of a place, or the surrender of an army, for the exchange of prisoners, or the ransom of captured property; and sometimes for the purpose of regulating the general manner of conducting hostilities, or the mode of carrying on the war. All these agreements, of whatsoever kind, are included under the general name of *compacts* or *conventions*. These compacts, which relate to the pacific intercourse of the belligerents, suppose the war to continue; those which put an end to it, come under the general head of *treaties of peace*, which have been considered in chapter ix.

Suspensions of arms, truces and conventions

§ 3. If the cessation of hostilities is only for a very short period, or at a particular place, or for a temporary purpose, such as for a parley, or a conference, or for removing the wounded, and burying the dead, after a battle, it is called *a suspension of arms*. This kind of compact may be formed between the immediate commanders of the opposing forces, and is obligatory upon all persons under their respective commands. Even commanding officers of detachments may enter into this kind of compact, but such an agreement can only bind the detachment itself; it cannot affect the operations of the main army, or of other troops not under the authority of the officer making it. A suspension of arms is only for a temporary purpose, and for a limited period. If the suspension of hostilities is for a more considerable length of time, or for a more general purpose, it is called a *truce* or an *armistice*. Truces are either partial or general.[2] A partial truce is limited to particular places, or to particular forces, as

[1] Grotius, *De Jure Bell. ac Pac.*, liv. iii. ch. xxi.; Bynkershoek, *Quæst. Jur. Pub.*, cap. i.; Vattel, *Droit des Gens*, liv. iii. ch. x. § 174.

[2] The following were among the regulations issued by the Navy Department of the United States, August 7, 1876, for the government of all persons attached to that service:—

CHAPTER XXI., 'Section I.—1. A flag of truce is, in its nature, of a sacred character, and the use of it to obtain knowledge or information surreptitiously against the interests or wishes of an enemy is to abuse it, and will subject the bearer to punishment as a spy.

'2. The senior officer present is alone authorised to despatch, or to

a suspension of hostilities between a town or fortress and the forces by which it is invested, or between two hostile armies or fleets. But a general truce applies to the general operations of the war, and whether it be for a longer or shorter period of time, it extends to all the forces of the belligerent States, and restrains the state of war from producing its proper effects, leaving the contending parties, and the questions between them, in the same situation in which it found them. Such a truce has sometimes been called a *temporary peace*, 'but when we call it so,' says Rutherforth, 'we use the word peace only in opposition to *acts* of war, and not in opposition to a *state* of war.'[1]

Authority to make them

§ 4. Such a general suspension of hostilities throughout the nation, can only be made by the sovereignty of the State, either directly or by authority specially delegated. Such authority not being essential to enable a general or commander to fulfil his official duties, is never implied, and, in such a case, the enemy is bound to see that the agent is specially authorised to bind his principal. But a partial

admit communication by, a flag of truce; a vessel in a position to discover the approach of such a flag is to communicate the fact promptly.

'3. Flags of truce should never be permitted to approach sufficiently near to acquire useful information. The firing of a gun, by the flag or senior officer's ship, is generally understood as a warning not to approach nearer.

'4. On the water, a flag of truce should be met at a suitable distance by a boat or vessel from the senior officer's vessel, in charge of a commissioned officer, having a white flag plainly displayed from the time of leaving until her return. In despatching a flag of truce the same precautions are to be observed.

'5. When a flag of truce is admitted, the ensign is always to be hoisted, and a white flag at the fore on board the vessel of the senior officer present, when no engagement is in progress, and kept flying until the flag of truce from the enemy has returned within his lines.

'6. A flag of truce cannot insist on being admitted, and should rarely be used, during an engagement; if then admitted, there is no breach of faith in retaining it. Firing is not necessarily to cease on the appearance of a flag of truce during an engagement, and should any person connected with it be killed, no complaint can be made. If, however, the white flag should be exhibited as a token of submission, firing is to cease.

'7. An attacking force should avoid firing on hospitals, whenever they are designated by flags or other symbols understood. It is an act of bad faith, amounting to infamy, to hoist the hospital protective flag over any other building, unless the attacking force should request or consent that it might be used, in order to spare edifices dedicated to science or literature, or containing works of art.'

[1] Rutherforth, *Institutes*, b. ii. ch. ix. § 22; Martens, *Précis du Droit des Gens*, § 293; a league is an alliance, offensive or defensive, but generally offensive.

truce may be concluded between the military and naval commanders of the respective forces, without any special authority for that purpose, where, from the nature and extent of their commands, such authority is necessarily implied, as essential to the fulfilment of their official duties. If the commander, in making such a compact, has abused his trust to the advantage of the enemy, he is accountable to his own State for such abuse. 'The nature of his trust implies,' says Rutherforth, 'that he has power to enter into a compact of this sort; and this power is sufficient to render the compact valid. The obligation that he is under, not to abuse his trust, regards his own State only, and not the enemy; and, consequently, it cannot affect the validity of the compact which he makes with the enemy.' A case occurring in the recent war between the United States and Mexico, serves to point out the limitation of the foregoing rule, with respect to the authority of a commander to make a general truce or armistice. By the convention of February 29, ratified by General Butler, March 5, and published in general orders, No. 18, March 6, 1848, it was stipulated that the Mexican civil authorities, political, administrative, and judicial, were to be re-established and installed in their respective offices. The terms of the convention were general, and included the entire republic of Mexico. But California, although a part of the Mexican territory, had been organised into a separate military department, entirely independent of the general commanding in Mexico. Pico, the Mexican governor of California, basing himself on the words of this convention, demanded of the American military governor of that department to be reinstated and recognised in his official position and character. The American commander not only refused to comply with Pico's demand, but adopted pretty severe measures to prevent any attempt on his part to exercise authority in California. If the convention, entered into by General Butler in the capital of Mexico, was really intended to include California, as its terms would seem to indicate, he, undoubtedly, exceeded his powers, and the armistice, so far as concerned California, was utterly null and void.[1]

[1] Butler, *General Orders*, No. 18, March 6, 1848; *Mason to Adj.-Gen.*, August 23, 1848; Ex. Doc., No. 17. *H. R.*, 31 *Cong.*, 1st sess., pp. 601 et seq.; Puffendorf, *De Jure Nat. et Gent.*, lib. viii. cap. vii. § 15; Bello,

Acts of individuals ignorant of a truce

§ 5. A truce binds the contracting parties from the time of its conclusion, unless otherwise specially provided; but it does not bind the individuals of the nation so as to make them personally responsible for a breach of it, until they have had actual or constructive notice. If, therefore, individuals, without a knowledge of the suspension of hostilities, kill an enemy or destroy his property, they do not, by such acts, commit a crime, nor are they bound to make pecuniary compensation; but, if prisoners are taken, or prizes captured, the sovereign is under obligation to immediately release the former and to restore the latter. To prevent the danger and damage that might arise from acts committed in ignorance of the truce, it is usual to fix a prospective period for the cessation of hostilities in different places, with due reference to their distance, and the means of communicating with them; it is also proper to provide for cases which do not come within the ordinary rules of notice, such as hostile vessels meeting at sea. But the State is responsible for the acts of its subjects after actual or constructive notice of the truce; it must punish them for the offence, and make ample compensation for the damage; should the State neglect or refuse justice on the complaints of the party injured, it becomes accessory to the wrong, and violates the compact.

What may be done during a truce

§ 6. During the continuance of a general truce, each party to it may, within his own territories, do whatever he would have a right to do in time of peace, such as repairing or building fortifications, constructing and fitting out vessels, levying and disciplining troops, casting cannon and manufacturing arms, and collecting provisions and munitions of war. He may also move his armies from one part of his territory to another, not occupied by the enemy, and call home or send abroad upon the ocean his vessels of war. And, in the theatre of hostilities, and in the face of the enemy, he may do whatever, under all the circumstances, would be deemed compatible with good faith and the spirit of the agreement. In the case of a truce between the governor of a fortress or fortified town, and the general or admiral investing it, either party is at liberty to do what he could safely have done if hostilities

Derecho Internacional, pt. ii. cap. ix. § 2; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. ch. xiii.; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. xii.

had continued. For example, the besieged general may repair his material of war, replenish his magazines, and strengthen his works, if such works were beyond the reach of the enemy at the beginning of the truce, and if the provisions and succours are introduced into the town in a way or through passages which the besieging army could not have prevented.

Puffendorf says: 'I confess I am of opinion that acts barely defensive are lawful in truces of any sort, though perhaps the truce was desired and obtained upon some other pretext. Thus, for instance, though a truce be granted only to bury the slain, I should not think it unlawful to make use of it to retreat to a place of better defence.'[1] But Grotius, on the contrary, says: 'There are also some things unlawful during a truce from the special nature of the agreement. As suppose a truce were granted only for the burying of the dead: nothing ought to be changed.'[2] Heffter agrees with Grotius. Albericus Gentilis,[3] referring to the instance given in Livy of the retreat of Philip with his army, under a flag of truce, says that Philip offended against the laws of war.[4] The case of Arabi Pasha at Alexandria is very similar to the above. On the morning of July 12, 1882, while the British fleet was lying off Alexandria, in support of the authority of the Khedive of Egypt, and the rebels under Arabi Pasha were being driven to great straits, a rebel boat, carrying a white flag of truce, was observed approaching H.M.S. 'Invincible' from the harbour, whereupon H.M. ships 'Téméraire' and 'Inflexible,' which had just commenced firing, were ordered to suspend fire. So soon as the firing ceased the boat, instead of going to the 'Invincible,' returned to the harbour. A flag of truce was simultaneously hoisted by the rebels on the Ras-el-Tin fort. These deceits gave the rebels time to leave the works and to retire through the town, abandoning the forts, and withdrawing the whole of their garrison, under the flag of truce. Furthermore they left the Bedouin convicts to pillage

[1] *De Jure Nat. et Gent.*, lib. viii. cap. vi. § 10.
[2] *De Jure Bell. ac Pac.*, lib. iii. cap. xxi. § 10.
[3] *De Jure Belli*, lib. ii. cap. xiv.
[4] 'Cum abire inde et fallere abiens hostem vellet, caduceatore sub occasum solis ad consulem misso, qui inducias ad sepeliendos equites peteret, frustratus hostem secunda vigilia, multis ignibus per tota castra relictis, silenti agmine abiit.' (Livy, lib. xxxi. cap. 38.)

and fire the town and murder the Europeans. For these offences Arabi was brought to trial by the Egyptian Government and condemned, with the full approval of the Government of Great Britain.[1]

It cannot be doubted that a besieged general cannot construct or repair works of defence, if he could not safely have done this in case the hostilities had continued; nor introduce provisions, military munitions or troops through passages which were occupied or commanded by the enemy at the time of the cessation of hostilities; nor can the besiegers continue works of attack which might have been prevented or interrupted by the besieged; for all acts of this kind would be making a mischievous and fraudulent use of the agreement, and violating its good faith and spirit; the general meaning of such compacts is, that all things within the limits of the theatre of immediate operations shall remain as they were at the moment of the conclusion of the truce. To receive and harbour deserters within such limits is an act of hostility, and, therefore, a violation of the implied conditions of a truce.

Conditional and special truces

§ 7. Where a truce is granted for a certain specified object, its effects are limited to the purpose mentioned, and if either party should attempt to perform any act to the disadvantage of the other, not comprehended in the object of such truce, this other party has the undoubted right to hinder it by force, notwithstanding the compact. 'Truces,' says Rutherforth, 'may either be absolute or conditional. A truce which is made without any conditions annexed to it, though it binds the parties not to do any hostile acts towards one another, leaves them at liberty to fortify their towns, to raise new armies, to build ships, or in any other respect to put themselves into a better posture of defence than they were in before. For by

[1] Extract from the text of the charges against Arabi Pasha, drafted by Borelli Bey on behalf of the prosecution :—'Ahmed Arabi is accused: 1. Of having, against the laws of war and in violation of the right of nations, hoisted the white flag at Alexandria on the morning of July 12, and of having at the same moment withdrawn his troops, and ordered the pillage and firing of the town of Alexandria ('fait procéder au pillage et à l'incendie').'

Extract from despatch of Earl Granville to Sir E. Malet (October 23, 1882) :—'On September 8 you were informed that . . . H.M.'s Government would not take steps to prevent execution in cases such as the following : having been guilty of taking part in the burning of Alexandria, of abusing the flag of truce on July 12, or of being implicated in the murder of Europeans.'

agreeing merely not to do any hostile act they cannot be understood to have bound themselves not to guard, as well as they can, against any future hostile acts which may be done against them. Conditional truces are broken when one of the parties does anything which is contrary to the conditions that have been agreed upon. All truces granted for a certain purpose are confined to the purpose; and the party who makes use of the cessation of hostilities, to do anything that is not included within this purpose, and that is to the disadvantage of the other party, breaks the truce. For as this purpose is the sole reason of the compact, the right arising from the compact can extend no further than this purpose extends. And usually a breach of truce, on one part, will justify the other part in beginning hostilities again before the time of the truce would have otherwise expired.'[1]

Their interpretation

§ 8. Truces and other military compacts are to be interpreted by the same rules as treaties or other agreements. Most questions relating to such compacts may be easily determined, either by considering the nature and character of the compact itself, or by applying to it the common rules of interpretation. Nevertheless, a difference of opinion will often arise respecting the proper construction to be given to particular terms, which are, in their nature, ambiguous. Thus, writers on the laws of war have discussed the question whether a truce for a given period—as, for instance, from the first of January to the first of February—will include or exclude the first day of each of these months. Grotius is of opinion, that the first day of January would be excluded, and the whole of the first day of February included. Puffendorf, Heineccius, and Vattel would include in the truce both the day of its commencement and the day of its termination. Rutherforth can see no good reason why one day should be excluded and the other included. 'One would rather think,' he says, 'that the first day is the limit of the truce at one end, as the last day is the limit of it at the other end; and, consequently, that

[1] Rutherforth, *Institutes*, b. ii. ch. ix. § 22.

In the island of Cayenne, when the British were before Fort Diamant, as a preliminary measure, Captain Yeo tried the effect of a summons. The French general's advanced guard allowed the gig with the flag of truce to approach within a boat's length, then fired two volleys at Lieut. Mulcaster and his party, and quickly retreated. Upon a second attempt a field piece was discharged at them. (James, *Nav. Hist.*, vol. v. 211.)

there is the same reason for reckoning the first day, that there is for reckoning the last day, as a part of the time which is included in the truce.' The rule, however, proposed by the English commissioners in their report on the practice of the English courts in 1831, is to compute the first day exclusively, and the last day inclusively, in all cases. The general rules laid down by text-writers, respecting the interpretation and observance of truces and other compacts in war, are necessarily somewhat indefinite, and questions almost always arise in their application to particular cases; it is, therefore, important that stipulations should be inserted in such compacts specifying what may and what may not be done by each party, both within and without the limits of the place, in case of a siege, or of the immediate theatre of military operations, if it be between belligerent forces in the field. Moreover, if the cessation of hostilities is for a given period of time, in order to avoid all ambiguity, the time should be precisely stated, as from a certain hour of a certain day to a certain hour of another certain day; and if dates only are given, it should be stated whether or not either or both are included.[1]

Renewal of hostilities

§ 9. As a truce, or armistice, merely suspends hostilities, they are renewed at its expiration without any new declaration or notice; for as everyone is bound to know the effect of such termination, no public declaration is required. But if the truce was for an indefinite period of time, justice and good faith require due notice of intention by the party who terminates it. If, however, the conditions of the truce be broken by one belligerent, there is no doubt that the other may immediately resume hostilities without any declaration. It is sometimes stipulated in the truce, that the violator shall pay a certain penalty for the violation. In such case the penalty should be demanded before a return to war, and, if paid, the right of hostilities does not occur. A truce is not broken by the acts of private persons, unless they are *ordered* or *ratified* by public authority. But, unless the private offenders are punished or surrendered, and unless the thing seized

[1] Vattel, *Droit des Gens*, liv. iii. ch. xvi. §§ 244, 245; Rutherforth, *Institutes*, b. ii. ch. ix. § 22; Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. xxi. § 9; Puffendorf, *De Jure Nat. et Gent.*, lib. viii. cap. vii. § 8; Heineccius, *Elem. Juris*, lib. ii. cap. ix. § 208.

is restored, or compensated for, it is legally *presumed* that the act of the private offender was duly ordered or ratified.[1] This is the rule of public law.

§ 10. *Capitulations* are agreements entered into by a commanding officer for the surrender of his army, or by the governor of a town, or a fortress, or particular district of country, to surrender it into the hands of the enemy.[2] Capitulations usually contain stipulations with respect to the inhabitants of the place which is surrendered, the security of their religion, property, privileges and franchises, and also with respect to the troops or garrison, either allowing them to

Capitulations

[1] During the war in 1807, the British squadron, under Sir Edward Pellew, arrived off Point Pauka, and a commission, with a flag of truce, was immediately sent to the commandant of the Dutch naval force for the surrender of the ships of war lying at Gressie. The Dutch commodore thought fit to detain the boat, and to place in arrest the persons on board of her. He then sent one of his officers to Sir Edward, with information of the unwarrantable step he had taken, accompanied with a flat refusal to deliver up the ships, although they were all in a dismantled state, with their guns on shore. The Governor and Council of Sourabaya, a settlement about fifteen miles higher up the river, and to which Gressie was subordinate, released the gentlemen of the commission and the boat's crew, disclaimed the violent measures pursued by the commodore, and offered to treat. By the treaty the ships were delivered up to the British, but as they had previously been scuttled by the Dutch commodore, the British completed their destruction by burning them. (James, *Nav. Hist.*, vol. iv. 358.)

[2] In 1870, the French being unable to defend Versailles, suffered the first German troops to enter therein under the following conditions, viz. :—'1. Respect for persons and properties, for public monuments and objects of art. 2. Preservation by the *Garde Nationale* alone of arms (without powder), uniforms and posts, for the service of police in the town, and at the prison. 3. The German troops will be lodged in the barracks, and in public buildings turned into barracks. The officers will be lodged among the inhabitants, if necessary (as also soldiers, if the barracks do not suffice). 4. The civil and military hospitals will be respected, and the wounded not imprisoned, according to the Convention of Geneva. 5. The food for marching and forage shall be delivered to the German troops, without any contribution of war. Done at the Hôtel de Ville, the 19th of September, 1871.'

This convention was signed, by a Major of the Prussian army, subject to the ratification of the General of his Division. The next day this General informed the Mayor, that this convention could not be ratified, because Versailles was an open town, and not a fortress or stronghold, and that this decision, which had been submitted to the Crown Prince, was according to the laws of war. The articles of convention were therefore null and void. The National Guard were obliged to give up their arms. The Mayor was assured, that the 'laws of humanity' would be observed towards the inhabitants, and that the public buildings, especially the museum, would be respected. Notwithstanding this, in consequence of the complaints made to him of the robberies and violence on the part of the soldiers, the Mayor was forced to complain to the General, that very same evening. (Delerot, *Versailles.*)

march out with their arms and baggage, with the honours of war, or requiring them to lay down their arms and surrender as prisoners of war. The general phrase 'with all the honours of war,' is usually construed to include the right to march with colours displayed, drums beating, &c. It is proper, however, that such matters should be precisely stated in the articles of capitulation. As an example of courtesy between belligerents, it may be mentioned that in 1802, on Captain Carden, of the British ship 'Macedonian,' presenting his sword to Commodore Decatur, of the American ship the 'United States,' that officer declared he could never take the sword of a man who had so nobly defended the honour of it.[1] The authority to make capitulations falls within the scope of the general powers of the chief commander of the military or naval forces, or of the town, fortress, or district of country included in the capitulation. The power of the general or admiral to enter into an ordinary capitulation, the same as in the case of a truce, is necessarily implied in his office. So of the chief officer of a town, fortress, or district of country. 'The governor of a town,' says Rutherforth, 'is the commander of the garrison, that is, of an army employed for the particular purpose of defending the town. The nature, therefore, of his trust implies, that his compacts about surrendering the town will bind himself and the garrison. If he surrenders it when he might have defended it, or upon worse terms than he might have made, he is accountable to his own State for his misconduct; but the abuse of his power does not affect any compact which he makes, in consequence of that power.' But if unusual and extraordinary stipulations are inserted in the capitulation which are not within the ordinary and implied powers of the officer making it, they are not binding either upon the State or upon the troops. For example, if the general should stipulate that his troops shall never bear arms against the same enemy, or, if the governor of a place should agree to cede it to the enemy as a conquest, such agreements, not coming within his implied powers, would be null and void, unless special authority to that effect had been given to him, or his acts should subsequently receive the sanction of his government.[2]

[1] James, *Nav. Hist.*, vol. vi. 121.

[2] See the Conventions of Closter Seven and of El Arish, *supra*, vol. i. ch. viii. p. 277; Rutherforth, *Institutes*, b. ii. ch. ix. § 21; Martens,

§ 11. Small detached parties or individuals, whether belonging to the military service or not, who happen to fall in with the enemy in a place distant from succour or any superior officer, are left to their own discretion and may, so far as concerns their own persons, do everything which a commander might do with respect to himself and the troops under his command. Promises made by individuals under such circumstances, if confined to their own persons and within the sphere of a private individual, are valid and binding, and the sovereign has no right to release them from their obligations, or compel them to violate the compact. For, when a subject can neither receive his sovereign's orders

Individual promises

Précis du Droit des Gens, §§ 291, 295; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. xii.; Phillimore, *On Int. Law*, vol. iii. § 121; 'La Gloire,' 5 *Rob.*, p. 197; Ompteda, *Litteratur*, &c., t. ii. p. 648; Moser, *Versuch*, &c., t. ix. pt. i. pp. 157, 176; Heffter, *Droit International*, § 142.

In April 1865 General Grant wrote to General Lee that he proposed to receive the surrender of the Army of Northern Virginia on the following terms, viz.:—1. That rolls of all the officers and men were to be made in duplicate, one copy to be given to an officer of the selection of the former, the other to be retained by whomsoever the latter might appoint. 2. That the officers give their individual paroles not to take arms against the Government of the United States until properly exchanged, and each commander of a company or regiment to sign a like parole for his men. The arms, artillery, and public property to be parked and stacked, and turned over to the officers appointed by the former to receive them. That this does not include the side arms of the officers, nor their private horses or baggage. 3. That, this being done, each officer and man shall be allowed to return to his home, and shall not be disturbed by the United States authority so long as they observe their paroles and the laws in force where they reside. General Lee accepted these terms on the same day, and the other rebel armies subsequently surrendered on substantially the same terms.

By an agreement made the same month between General Johnston, commanding the Confederate army, and Major-General Sherman, commanding the army of the United States, the Confederate armies then in existence were to be disbanded and conducted to their several State capitals, therein to deposit their arms and public property in the State arsenal; and each officer and man to agree to cease from acts of war, and to abide the action of both State and Federal authorities. The number of arms and munitions of war to be reported to the Chief of Ordnance at Washington, subject to the future action of the Congress of the United States, and in the meantime to be used solely to maintain peace and order within the borders of the different States. The Executive of the United States to recognise the several State governments, on their officers and legislatures taking the oaths prescribed by the Constitution of the United States. The Federal Courts in the several States to be re-established; the people and inhabitants of those States to be guaranteed their political rights and franchise so far as the Executive could do so. The Executive authority of the Government of the United States not to disturb any of the people by reason of the war, so long as they lived in peace and quiet. In fact, a general amnesty to be established.

nor enjoy his protection, he resumes his natural rights, and may provide for his safety by any just and honourable means in his power. Individual promises of this kind, made with competent powers, are of as binding a nature as truces and capitulations, and the good of the State equally requires that faith be kept on such occasions as in more formal agreements. Thus, a prisoner who is released on parole, is bound to observe it with scrupulous punctuality, nor can the sovereign oppose such observance of his engagement. But if a soldier should be made prisoner in the vicinity of his commander and while under his immediate orders, he is not properly the master of his own acts or left to his own discretion, and, under ordinary circumstances, he should wait as prisoner of war, till his superiors can treat for his exchange or release. But if he fall into the hands of a barbarous enemy, and, to avoid a cruel imprisonment, or to save his life, he promises a ransom or services not treasonable, his agreement should be respected by his superiors.[1]

[1] Vattel, *Droit des Gens*, liv. iii. ch. xvi. § 264.

The terms of surrender included in the agreement of Sherman and Johnston, by which it was stipulated that the Confederate officers and men should not be molested by the authorities of the United States, were granted in the exercise of a belligerent right only, and not in the exercise of a sovereignty. The President could only delegate to his subordinate officers such powers as were vested in him as the military chief of the nation. The agreement was, therefore, merely a military parole, and terminated with the war. During the war the United States Circuit Court would not have permitted a Confederate officer, included in the capitulation, to have been arrested on its process, but after the war was ended, such arrest on a charge of treason was lawful. (United States *v.* Rucker, 1 *Am. Law Rev.*, 217.)

The following were among the regulations issued by the Navy Department of the United States, August 7, 1876, for the government of all persons attached to that service :—

CHAPTER XXI., 'Section II.—1. Paroling must always take place by the interchange of signed duplicates of a written document, in which the names and rank of the persons paroled are correctly and distinctly stated. Anyone who intentionally misstates his rank forfeits the benefit of his parole, and is liable to punishment

'2. None but commissioned officers can give parole for themselves and their command, and no inferior officer can give parole without the authority of his superior, if within reach.

'3. Paroling of entire bodies of men after a battle or capture, and the dismissal of large numbers of prisoners, with a general declaration that they are paroled, is not permitted.

'4. An officer who gives a parole for himself, or his command, without referring to his superior, when it is in his power to do so, will be considered as giving aid and comfort to the enemy, and may be regarded as a deserter and be punished accordingly.

'5. For an officer the pledging of his parole is his individual act ; but

§ 12. A *passport*, or *safe-conduct*, is a document granting persons or property an exemption from the operations of war, for the time, and to the extent prescribed in the instrument itself. The term passport is applied to personal permission to friends given on ordinary occasions, both in peace and war, where there is no reason why the parties named in them should not go where they please; while safe-conduct is the name usually given to the instrument which authorises an enemy, or an alien, to go into places where he could not go without danger, or to carry on trade forbidden by the laws of war. The word passport, however, is more generally applied to persons, and safe-conduct to both persons and things. A passport is not transferable by the person named in the permission, for although there were no objections to giving the privilege to him, there might be very serious objections to the individual taking his place. It, however, generally includes the servants and personal baggage of the person to whom it is granted, unless there should be particular objection to the passage of such servants, or to the admission of the baggage; but, to save all doubt and difficulty in such matters, it is

Passports and safe-conducts

no wholesale paroling by an officer for a number of inferiors in rank, in violation of paragraph 1, is permitted, or will be considered valid.

'6. No person belonging to the navy, or marine corps, can give his parole except through a commissioned officer. Individual paroles not given through an officer, are not only void, but make the individuals giving them amenable to punishment as deserters. The only admissible exception is, when individuals, separated from their commanders, have suffered long confinement, without the possibility of being paroled through an officer.

'7. No prisoner can be forced by a hostile government to pledge his parole, and threats or ill-treatment to force giving parole is contrary to the laws of war.

'8. No prisoner of war can enter into an engagement, inconsistent with his character and duties, as a citizen or subject of his State. He can only bind himself not to bear arms against his captor for a limited period, or until exchanged, and this only with the stipulated or implied consent of his own government. If the engagement which he makes is not approved by his government, he is bound to return and surrender himself.

'9. No prisoner can give his parole that he will not bear arms against the government of his captors, or their allies, beyond the period of an exchange or release of prisoners, or during the period of the existing war.

'10. While the pledging of the military parole is a voluntary act of the individual, the capturing power is not obliged to grant it.

'11. Parole not authorised by the law of war is not valid until approved by the government of the individual so pledging it; and pledging an unauthorised military parole is a military offence, punishable under the laws of war.'

usual to enumerate with precision every particular with respect to the extent of the indulgence. A safe-conduct for effects, without designating the person who is to introduce or remove them, may be introduced or removed by any agent of the owner, unless the agent selected should be personally objected to, as an object of suspicion or danger. Instruments of this kind are always to be taken strictly, and must be confined to the persons, effects, purpose, place and time for which they are granted. But, if the person who has received a passport should be detained in an enemy's country by sickness or by force, beyond the specified time, he should receive a new instrument, or be considered as still under the protection of the old one. But no detention by business, or by circumstances not entirely unavoidable, will entitle him to such indulgence. If, for example, he should take advantage of a suspension of hostilities to remain, he will do so at his peril, and if he should be found in an enemy's country at the termination of the truce, the time named in his passport having expired, he will be subject to the ordinary laws of war, without any claim for special protection. Passports and safe-conducts are of two kinds—those which are limited in their effects to particular places or districts of country, and those which are general and extend over a whole country.[1] Those of the first class may be granted by military and naval officers or governors of towns, to have effect within the limits of their respective commands, and such instruments must be respected by all persons under their authority. The power to issue such documents is implied in the nature of their trust. But a general passport, or safe-conduct, to extend over the whole country, must proceed from the supreme authority of the State, either directly or by an agent duly empowered to issue it.[2]

When and how revoked

§ 13. A passport, or safe-conduct, may, for good reasons, be revoked by the authority which granted it, on the general principle of the law of nations, that privileges may always

[1] See also ch. xxii. § 19, note, as to the Mediterranean pass, which was the only paper recognised by the Barbary corsairs.

[2] The Government of the United States declared, in August 1865, that paroled prisoners of the Confederate States who asked for passports as citizens of the United States, and against whom no special charges were pending, would be furnished with passports upon application to the Department of State in the usual form.

be revoked when they become detrimental to the State. A permission granted by an officer may, for this reason, be revoked by his superior, but, until so revoked, it is as binding upon the successor as upon the party who issued it. The reasons for such revocation need not always be given; but permissions of this kind can never be used as snares to get persons or effects into our power, and then, by a revocation, hold the persons as prisoners, or confiscate the property. Such conduct would be perfidy toward an enemy, and contrary to the laws of war.[1]

Their violation, how punished

§ 14. Any violation of the good faith and spirit of such instruments entitles the injured party to indemnity against all injurious consequences. Persons violating these instruments are also subject to punishment by the municipal laws of the State by which they are issued.[2]

Safe-guards

§ 15. *Safeguards* are protections granted by a general or other officer commanding belligerent forces, for persons or property within the limits of their commands, and against the operations of their own troops. Sometimes they are delivered to the parties whose persons or property are to be protected; at others they are posted upon the property itself, as upon a church, museum, library, public office, or private dwelling. They are particularly useful in the assault of a place, or immediately after its capture, or after the termination of a battle, to protect the persons and property of friends from destruction by an excited soldiery. Violations of such instruments are usually punished with the utmost severity.

[1] Kent, *Com. on Amer. Law*, vol. i. p. 163; Phillimore, *On Int. Law*, vol. iii. § 101; Garden, *De la Diplomatie*, liv. vi. § 16; Bello, *Derecho Internacional*, pt. ii. cap. ix. § 4; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. xi.

[2] *U. S. Statutes at Large*, vol. i. p. 118; Brightly, *Digest of Laws of the U. S.*, p. 41. Section tweny-eight of the Act of Congress, approved April 30, 1790, provides that, if any person shall violate any safe-conduct or passport, duly obtained and issued under the authority of the United States, such person so offending, on conviction, shall be imprisoned not exceeding three years, and fined at the discretion of the court. If a soldier or subordinate officer should violate a passport, or safe-conduct, issued by his superior, he would, probably, also be subject to be punished for the military offence under military law by a court-martial.

'In England,' says Lord Coke (4 *Inst.*, 152), 'all leagues or safe-conducts should be of record—that is, they ought to be enrolled in Chancery or in the Wardrobe, as being matters of State, that each subject may know who are in amity with the king and who are not, who are enemies and can maintain no action, and who are in league and may have actions personal.'

A guard of men is sometimes called a safeguard when detached to enforce the safety of the persons and property thus protected. Such guards are justified in resorting to the severest measures to punish any violation of the safety of their trust. A safeguard, when used to express a kind of passport or safe-conduct, is to be construed according to the rules of interpretation applicable to such instruments.[1]

Cartels for prisoners

§ 16. A *cartel* is an agreement between belligerents for the exchange or ransom of prisoners of war. The actual existence of a war is not essentially necessary to give effect to cartels, but it is sufficient if they are entered into prospectively and in expectation of approaching hostilities; for the occasions for them may just as naturally arise from a view of approaching events, and parties may contract to guard against the consequences of hostilities which they may foresee. Both belligerents are bound to faithfully observe such compacts, and a cartel party sent under a flag of truce to carry into execution the provisions of a cartel is equally under the protection of both. 'Good faith and humanity,' says Wheaton, 'ought to preside over the execution of these compacts, which are designed to mitigate the evils of war, without defeating its legitimate purposes. By the modern usages of nations, commissaries are permitted to reside in the respective belligerent countries, to negotiate and carry into effect the arrangements necessary for this object. Breach of good faith in these transactions can be punished only by withholding from the party guilty of such violation the advantages stipulated by the cartel; or, in cases which may be supposed to warrant such a resort, by reprisals or vindictive retaliation.' In the United States such compacts are not deemed treaties in the sense of the Constitution; a cartel for the exchange of prisoners, between the United States and Great Britain, in 1813, was ratified by the American Secretary of State (May 14).[2]

[1] Garden, *De la Diplomatie*, liv. vi. § 16; *U. S. Statutes at Large*, vol. ii. p. 366; *U. S. Army Regulations of* 1857, §§ 769-773; Heffter, *Droit International*, § 142; Dunlop, *Digest of Laws of U. S.*, p. 381.

Article 55 of the rules and articles of war of the United States, approved April 10, 1806, provides that 'whosoever, belonging to the armies of the United States employed in foreign parts, shall force a *safeguard* shall suffer death.'

To force a safeguard (soldiers) is punishable with death under section 6 of the British Army Act, 1881.

[2] Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 3; the 'Carolina,' 6 *Rob.*, 336; 'La Gloire,' 5 *Rob.*, 492; the 'Mary,' 5 *Rob.*, 200;

Cartel ships

§ 17. A *cartel ship* is a vessel commissioned for the exchange or ransom of prisoners of war, or to carry proposals from one belligerent to the other, under a flag of truce. Such commission and flag are considered to throw over the vessel, and the persons engaged in her navigation, the mantle of peace; she is, *pro hac vice*, a neutral licensed vessel, and her crew are also neutrals; and so far as relates to the particular service in which she is employed, she is under the protection of both belligerents. But she can carry no cargo, and no ammunition or implements of war, except a single gun for firing signals. This is regarded as a species of navigation which, on every consideration of humanity and policy, should be conducted with the strictest regard to the original purpose, and to the rules which are built upon it, since, if this mode of intercourse be broken off, it will be followed by calamitous results to individuals of both belligerents. It is, therefore, said by high authority, that cartel ships cannot be too narrowly watched; and that both parties should take care that the service should be conducted in such a manner as not to become a subject of jealousy and distrust between the two nations. The authority to commission a cartel ship is supposed to emanate from the supreme power of the State, but it may be issued by a subordinate officer, in the due execution of a public duty. When a cartel ship appears to have been employed in the public service, and for the purposes of humanity, it will be presumed that the commission under which she acts was issued by the sanction of the councils of the State, until renounced by the sovereignty from which it is supposed to emanate. Thus, a cartel, granted by the commander of the British forces, at Amboyna, to a Dutch vessel, was held by Sir William Scott to be valid for the protection of the vessel from capture and condemnation.[1]

Their rights and duties

§ 18. The rights, immunities, and duties of cartel ships have been matters of discussion and judicial decision in prize courts. Sir William Scott gave a very elaborate opinion on

Martens, *Précis du Droit des Gens*, § 275; Garden, *De la Diplomatie*, liv. vi. § 16. Cartels are of such force that the sovereign power cannot annul them. (United States *ex re* Henderson *v.* Wright, 2 *Pittsb.*, 440.)

[1] Duer, *On Insurance*, vol. i. pp. 539, 540; the 'Carolina,' 6 *Rob.*, 336; the 'Venus,' 4 *Rob.*, 355.

this subject, in the case of the 'Daifjie.'[1] With respect to the character of the ships employed in such service, he says it is generally immaterial whether they are merchant ships or ships of war, but there may be extreme cases in which the nature of the ship might be material; 'as, if a fire ship was to be sent on such service to Portsmouth or Plymouth, though she had prisoners on board, she would undoubtedly be an unwelcome visitor to a naval arsenal, and her particular character might fairly justify a refusal to admit her.' He was also of opinion that the cartel protected such ships, not only *in trajectu, ad eundum et redeundum*, but also in going from one port to another to be fitted up and to take prisoners on board, although the passage of ships from one port to another of the enemy is liable to suspicion. Moreover, that a vessel *going* to be employed as a cartel ship is not protected, by mere intention, on her way, for the purpose of taking on herself that character when she arrives. When it is necessary to send to another port for vessels for such purpose, it is proper to apply to the enemy's commissary of prisoners for a pass or special safe-conduct. The principal question to be decided in such cases, is that of intention; if the vessel is actually commissioned and employed as a cartel ship, if she is fitted out and conducts herself, in every respect, as a cartel ship, she is protected as such; but if she is acting fraudulently, she is liable to condemnation. Imprudence and negligence do not constitute fraud.

Ransom of prisoners of war

§ 19. The present usage of civilised nations is, as already stated, to exchange prisoners of war, or to release them on their *parole*, or word of honour, not to serve against the captor again for a definite period, during the war, or till properly exchanged.[2] But it was formerly the frequent practice for the State to leave to every prisoner, or at least during the war, the care of redeeming himself, and the captor had a lawful

[1] 3 *Rob.*, 141. A cartel ship may not trade, or carry a cargo, under pain of the confiscation both of ship and cargo ('La Rosine,' 2 *Rob.*, 372); but if appointed before the breaking out of war, will not necessarily be condemned for having taken a cargo on board since the war commenced. (The 'Carolina,' *supra*.) Enemies carried on a cartel ship by their own consent must not engage in any act of hostility whilst on board. (The 'Mary,' 5 *Rob.*, 200.) As to a cartel ship being a neutral licensed vessel, see Crawford *v.* William Penn, *Peters Circ. C. R.*, 106.

[2] Paroles of prisoners of war are sacred obligations, and the national faith is pledged to their fulfilment. (United States *ex re* Henderson *v.* Wright, 2 *Pittsb.*, 440.)

right to demand a *ransom* for the release of his prisoners.[1] This practice gave rise to certain rules with respect to the interpretation of the particular agreements of this kind. As the captor was held responsible for the treatment of his prisoner, he could not divest himself of this responsibility by transferring him to another; but, having agreed with his prisoner concerning the price of his ransom, he could transfer this right to a third party, for the agreement then becomes a perfect contract, binding upon both parties, and the right to receive the price may be transferred by the captor to whomsoever he pleases. If the prisoner should die before being set at liberty, although the price of the ransom should have been agreed upon, it was not held to be due from his heirs; but if he had obtained his liberty at the time of his death, good faith would require the payment of the price agreed upon. If he should be retaken by his own party after making the compact of ransom, but before its execution, it would not be due, because he was not set at liberty in virtue of the agreement. If he has concealed his rank and character when making the agreement as to the price of ransom, he is guilty of fraud, and, on its discovery, the captor is justified in annulling it. If he has agreed to perform any particular act, if not inconsistent with his duty to his own State, as a consideration for his release, he is bound to perform it, and he is deserving of punishment for a neglect or refusal to fulfil his promise. At one time, the wealth to be amassed by the ransom of prisoners of war was one of the greatest inducements to military service, and curious instances of the importance which was attached to this consideration occur in history. Thus when the Maid of Orleans was to be brought to her disgraceful trial, the advisers of the measure thought it right to pay her captors, whose property she had become, a sum equal to what it was supposed they might be able to make by her ransom.[2]

§ 20. The term *ransom* is now usually applied to property

[1] See *ante*, ch. xx. § 8.

[2] Phillimore, *On Int. Law*, vol. iii. § 110; Martens, *Recueil de Traités*, tome iii. p. 361; Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 3; Lingard, *Hist. of England*, vol. v. p. 118; *U. S. Statutes at Large*, vol. iii. pp. 351, 778; Niles, *Register*, vol. ii. p. 382; Bello, *Derecho Internacional*, pt. ii. cap. ix. § 5; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xiii.; Dumont, *Corps Diplomatique*, tome vii. p. 231.

Ransom of captured property

taken from an enemy in war, and surrendered or restored to the owner on the payment of, or agreement to pay, a specified sum of money, which is called *ransom money*. This term was formerly applied to the redemption of property captured on land, as well as on the high seas; but, by general use, it is now understood to apply to the agreement made between the commander of a captured vessel or cargo, and the captor, by which the latter permits the former to depart with his vessel, and gives him a safe-conduct, in consideration of a sum of money which the former, in his own name, and in the name of the owners of the vessel and cargo, promises to pay at a future time named. This contract is usually made in writing, in duplicate, one of which is kept by the captor, which is properly called the *ransom bill*, and the other by the captured vessel, which is its *safe-conduct*. The general law relating to the ransom of captured property, is fully discussed by Story.[1]

In England

§ 21. The contract of ransom is considered in England as tending to relax the energy of war, by depriving cruisers of the chance of recapture, and several statutes in the reign of George III. absolutely prohibited to British subjects the privilege of ransom of property captured at sea, unless in a case of extreme necessity, to be judged of by the Court of Admiralty; but now by the Naval Prize Act, 1864, her Majesty in Council may from time to time, in relation to any war, make such orders as may seem expedient, according to circumstances, for prohibiting or allowing, wholly or in certain cases, or subject to any conditions or regulations or otherwise, as may from time to time seem meet, the ransoming or the entering into any contract or agreement for the ransoming of any ship or goods belonging to any of her Majesty's subjects, and taken as prize by any of her Majesty's enemies. 'Other maritime nations,' says Kent, 'regard ransoms as binding, and to be classed among the few legitimate *commercia belli*. They have never been prohibited in the United States, and the Act of Congress of August 2, 1813, interdicting the use of British licenses, or passes, did not apply to the contract of ransom.'[2]

[1] Maisonnaire *v.* Keating, 2 *Gallis R.*, 337; Bouvier, *Law Dic.*, verb. 'Ransom;' Pothier, *Droit de Prop.*, Nos. 134–144; Valin, *Des Prises*, art. xix.; Miller *v.* 'Resolution,' 2 *Dall. R.*, 15.

[2] 45 Geo. III., c. 72; Kent, *Com. on Am. Law*, vol. i. p. 105; Chitty,

If given by one ally, is binding upon the others

§ 22. The general authority to capture, which is delegated by the belligerent State to its commissioned cruiser, involves the power to ransom captured property, unless prohibited by the law of the captor's own country. The contract made for the ransom of enemy's property taken at sea, is generally carried into effect by a safe-conduct issued by the captor, permitting the captured vessel and cargo to proceed to a designated port, by a prescribed route, and within a limited time, and such a document furnishes a complete legal protection against the cruisers of the same belligerent State, or its allies, during the period and within the terms prescribed in the safe-conduct. 'From the very nature of the connection between allies,' says Kent, 'their compacts with the common enemy must bind each other, when they tend to accomplish the objects of the alliance. If they did not the ally would reap all the fruits of the compact, without being subject to the terms and conditions of it; and the enemy with whom the agreement was made would be exposed, in regard to the ally, to all the disadvantages of it, without participating in the stipulated benefits. Such an inequality of obligation is contrary to every principle of reason and justice.'

If ransomed vessel be lost

§ 23. As a general rule, the captor, by the safe-conduct implied in a ransom bill, simply guarantees the ransomed vessel against being interrupted in its course, or retaken by other cruisers of its own nation or of its allies, but not against loss by the perils of the sea. There is no implied insurance in the ransom bill against such losses. If, therefore, the ransomed vessel should founder at sea, or be wrecked, and become a total loss, the contract is still binding, and the ransom bill payable to the captor. But it is sometimes specified in the contract of ransom, that the loss of the vessel by the perils of the sea shall discharge the captured party from the payment of the ransom; such a clause is restrained to the case of a total loss *on the high seas*, and is not extended to stranding, which might afford the master a temptation to fraudulently cast away his vessel, in order to save the most valuable part of his cargo, and avoid the payment of the ransom.[1]

On Com. Law, vol. i. p. 428; Goodrich *v.* Gordon, 15 *Johns. R.*, 6; Girard *v.* Ware, 1 *Peters C. C. R.*, 142; the 'Saratoga,' 2 *Gallis R.*, 164; Brooks *v.* Dorr, 2 *Mass. R.*, 39; Spafford *v.* Dodge, 14 *Mass. R.*, 66; Ricord *v.* Bettenham, 3 *Burr.*, 1734.

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 28; Phillimore, *On Int. Law*, vol. iii. p. 110.

If it be recaptured

§ 24. If the ransomed vessel should exceed the time, or deviate from the course, prescribed in the contract, she forfeits her safe-conduct, and is liable to recapture; and if retaken, the debtors of the ransom are discharged from their obligation, which is merged in the prize, and the amount is deducted from the net proceeds thereof and paid to the first captor, whilst the residue is paid to the second captor. But any variation from the course prescribed, or the time limited, by the contract, caused by the stress of weather, or unavoidable necessity, does not work a forfeiture of the safe-conduct. If the captor, after having ransomed an enemy's vessel, is himself taken by the enemy, together with the ransom bill of which he is the bearer, this ransom bill becomes a part of the capture made by the enemy; and the persons of the hostile nation, who were debtors of the ransom, are thereby discharged from their obligation under the ransom bill. But questions relating to maritime captures and recaptures will be more particularly considered in the chapter on the rights and duties of captors.[1]

If hostage be captured

§ 25. Sometimes a *hostage* is taken for the faithful performance of the contract on the part of the captured. The death or the recapture of the hostage does not discharge the contract of ransom, unless there is an express stipulation to that effect; for the captor takes the hostage only as a collateral security, and the loss of such collateral security does not cancel the contract, or discharge the debtor from his obligation to pay the ransom. 'The practice in France,' says Kent, 'when a French vessel has been ransomed, and a hostage given to the enemy, is for the officers of the Admiralty to seize the vessel and her cargo, on her return to port, in order to compel the owners to pay the ransom debt, and relieve the hostage; and this is a course dictated by a prompt and liberal sense of justice.' Vattel and others have given very minute rules in relation to hostages for prisoners. If a hostage be given in order to procure the liberty of a prisoner, and the prisoner die, the hostage should be set free; but if the hostage die, the prisoner is not thereby restored to his liberty. If, however, one prisoner has been substituted for another, the death of one releases the other. If a prisoner be released on condition of procuring the release of another, and

[1] *Vide post.*, ch. xxxi.

that other dies before his liberty has been attained, it is said that the survivor is bound to return to his prison! No civilised nation would now impose such conditions.[1]

Suits on contracts of ransom

§ 26. Contracts of ransom, like all other agreements arising *jure belli*, and lawfully entered into between belligerents, suspend the character of enemy, so far as respects the parties to the contract. There can, therefore, be no just reason why the captor should not bring suit directly on the ransom bill. And such appears to be the practice in the maritime courts of the European continent. The English courts, however, have decided that the subject of an enemy is not permitted to sue in the British courts of justice, in his own proper person, for the payment of a ransom, on the technical objection of the want of a *persona standi in judicio*, but that the payment could be forced by an action brought by the imprisoned hostage in the courts of his own country for the recovery of his freedom. This technical objection is not based on principle, nor supported by reason, and the decision has not the sanction of general usage. 'The effect of this contract,' says Wheaton, 'like that of every other which may be lawfully entered into between belligerents, is to suspend the character of enemy, so far as respects the parties to the ransom bill; and, consequently, the technical objection of the want of a *persona standi in judicio* cannot, on principle, prevent a suit being brought by the captor directly on the ransom bill.' Lord Mansfield considered this contract as worthy to be sustained by sound morality and good policy, and as governed by the law of nations and the eternal rules of justice. Licenses to trade, which properly belong to *commercia belli*, will be discussed in a separate chapter.[2]

Flags of truce

§ 27. As flags of truce are sometimes sent from the enemy to forces in position, or on the march, or in action, nominally

[1] Vattel, *Droit des Gens*, liv. iii. ch. xvii. §§ 278–286; Kent, *Com. on Am. Law*, vol. i. p. 107.

Hostages were taken, during the Franco-German War, 1870, in districts theoretically, but not practically, occupied. The mayor of Neufchâtel and his adjunct, for instance, were made hostages for having allowed the arrest of some provision dealers engaged in supplying the German army. As a rule, where a fine was imposed on a town, and not paid, these two chief officials were kept in custody or under surveillance, until the money was forthcoming.

[2] Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 28; Anthon *v.* Fisher, *Doug. R.*, 649, note; the 'Hoop,' 1 *Rob. R.*, 169; Corun *v.* Blackburn, 1 *Doug. R.*, 641; Ricard *v.* Bettenham, 3 *Burr. R.*, 1734.

for making some convention, as for a suspension of arms, but really with the design of gaining information, it is proper that restrictions should be placed upon such use. Thus, if sent to an army in position, the bearer of such flag should never be allowed to pass the outer line of sentinels, nor even to approach within the range of their guns, without permission. If warned away, and he should not instantly depart, he may be fired on. Similar precautions may be taken by an army on the march. After the battle of Montebello, 1859, the French refused to receive flags of truce from the Austrian lines; but this was essential in order to conceal some manœuvres. If the flag proceeds from the enemy's lines during a battle, the ranks which it leaves must halt and cease their fire. When the bearer displays his flag, he will be signalled by the opposing force, either to advance, or to retire; if the former, the forces he approaches will cease firing; if the latter, he must instantly retire; for, if he should not, he may be fired upon.[1]

THE CONFERENCE OF BRUSSELS, 1874.

Conference of Brussels, 1874

Rules of military warfare were proposed at the Brussels Conference, 1874, which was attended by delegates from Germany, Austria, Belgium, Denmark, France, Great Britain, Greece, Italy, the Netherlands, Portugal, Russia, Spain, Switzerland, Sweden, and Turkey; but they have not yet been, and probably never will be, adopted by any nation. The United States was not represented.

A brief review of some of the most striking differences of opinion may be of interest.

The first section of the first chapter occasioned an argument as to the meaning of 'occupation,' in the first article of the Project, which provided that: '1. The occupation by the enemy of a part of the territory of a State with which he is at war suspends, *ipso facto*, the authority of the legal power of the latter, and substitutes in its place the military authority of the occupying State.' The German view was, that occupation is not altogether of the same character as a blockade, which is effective only when it is practically carried out. It does not always manifest itself by visible signs. If occupation is said to exist only where the military power is visible, insurrections are provoked, and the inhabitants suffer in consequence. A town left without troops must still be considered occupied, and any rising would be severely punished. Generally speaking,

[1] Scott, *Military Dic.*, p. 304.

In 1870 the Bishop of Strasburg, under a flag of truce, endeavoured to obtain permission from General Werder for the women and children to leave that town, but he was stopped at the outposts and informed that his application would be in vain. Eventually, on the arrival of the delegates from Switzerland, 1,400 old men, women, and children were allowed to leave for that country. (Edwards, *Germans in France.*)

the occupying power is established as soon as the population is disarmed, or even when the country is traversed by flying columns. The Russian view was that the discussion turned upon the word 'territory.' This was a general expression which must be interpreted liberally (*interpréter largement*); a province could not be occupied at every point: that was impossible. The view of Sweden and Norway was that greater power must not be accorded to the invader than he actually possesses. Occupation is strictly analogous to blockade, and can only be exercised where it is effective. The occupier must always be in sufficient strength to repress an outbreak. He proves his occupation by this act. An army establishes its occupation when its positions and lines of communications are secured by other corps. If a territory frees itself from the exercise of this authority, it ceases to be occupied. Occupation cannot be presumptive. Modified articles were subsequently adopted, in which an effort was made to reconcile the conflicting views by the use of carefully-balanced expressions. In the opinion of the British Government, the inhabitants of an invaded territory would find in such colourless phrases very inadequate protection from the liberal interpretation of the necessities and possibilities of warfare by a victorious enemy; while the existence of rules, the meaning of which is not distinct and indisputable, could not fail, should they ever be actually promulgated, to give rise to angry controversies which would intensify rather than mitigate the horrors of war.

The second chapter, relating to combatants and non-combatants, showed an equal difference of opinion, eventually smoothed over in a similar manner. The Swiss delegate, in his observations on the article requiring the use of a distinctive badge recognisable at a distance, remarked that a country might rise *en masse*, as Switzerland had formerly done, to defend itself, without organisation and under no command. The patriotic feeling which led to such a rising could not be kept down; and although these patriots, if defeated, might not be treated as peaceful citizens, it would not be admitted in advance that they were not belligerents. During the discussion, the Netherlands delegate remarked that if the plan laid down by the German delegate was to be sanctioned by the adoption of those articles which related to belligerents, as drawn up in the Project, it would either have the effect of diminishing the defensive power of the Netherlands, or would render universal and obligatory service necessary, a system to which public opinion in the Netherlands was still opposed. He therefore reserved more than ever the opinion of his Government. The Belgian delegate also made a declaration of reservation. Upon the consideration of section 2, chapter i., 'of the rights of belligerents with reference to private individuals,' and 'of the military power with respect to private individuals,' the rights of national defence were again warmly urged by the Netherlands, Belgian, and Swiss delegates. According to the view of the Netherlands, no country could possibly admit that, if a population of a *de facto* occupied district should rise in arms against the established authority of the invader, they should be subjected to the laws of war in force in the occupying army. He admitted that, in time of war, the occupier might occasionally be forced to treat with severity a population which might rise, and that, from its weakness, the population might be forced to submit; but he repudiated the idea of any Government contemplating the delivering over in advance to the justice of the enemy those men who, from patriotic motives, and at their own risk, might expose themselves to all the dangers consequent upon a rising. The delegate from Belgium added that if citizens were to be sacrificed for having attempted to defend their country at the peril of their lives, they need not find inscribed on the post at the foot of which they were about to be shot the

article of a treaty signed by their own Government, which had in advance condemned them to death.

The Swiss delegate, who had previously pointed out that Articles 45 and 9 (respecting conditions to be fulfilled by armed forces) were the cardinal points of the whole Project, declared that two questions, diametrically opposed to each other, were before the Committee: the maxims and interests, on the one hand, of great armies in an enemy's country, which imperatively demand security for their communications and for their *rayon* of occupation; and, on the other hand, the principles of war and the interests of the invaded, which cannot admit that a population should be handed over as criminals to justice, for having taken up arms against the enemy. A reconciliation of these conflicting interests was, in his opinion, impossible in the case of a *levée en masse* in an occupied country. In the face of the opposite opinions expressed on the articles under discussion, only a provisional modification of them was accepted by the meeting, omitting those upon which the greatest disagreement had been shown. The Conference was unable to arrive even at a provisional modification of chapter ii., 'of requisitions and contributions,' and, after a variety of views had been expressed, of the most opposite character, the course was adopted of accepting a certain reading in the Project and entering the dissentient opinions in the Protocol.

The articles in section 4, 'on reprisals,' did not attain to this stage. The general feeling seemed to be that occasions on which reprisals of a severe character had been executed were of far too recent a date to allow the practice to be discussed calmly, and the articles were withdrawn; but in passing over these articles in silence the delegates really evaded one of the principal difficulties inherent in any scheme for the preparation of the rules of war to be observed by belligerents—namely, the question how those rules are to be enforced.

Rules of international law in which the interests of neutrals and belligerents are concerned can be enforced in the last resort by recourse to war. In the case, however, of countries already engaged in hostilities, there will be no means, except by reprisals, for either belligerent to enforce upon the other the observance of any set rules. It is true that, on the outbreak of war, it would be almost certain that one or other belligerent would appeal to neutral nations against some real or supposed infraction of these rules by his opponent. It can, however, scarcely be seriously contemplated that neutral countries should intervene to enforce their observance; and, unless their interference were attended by the exercise of compulsion, in which case the circle of hostilities would soon be indefinitely enlarged, it cannot be supposed that the contending nations would respect it.

The remaining articles of the Project, in the words of Baron Jomini, 'ont été l'objet de rédactions transactionnelles, destinées à concilier toutes les nuances d'opinion.' They relate to the 'means of injuring the enemy,' 'sieges and bombardments,' 'spies,' 'prisoners of war,' 'bearers of flags of truce,' 'capitulations,' 'sick and wounded,' 'armistices,' 'belligerents interned, and wounded treated in neutral territory.' Of these the articles on sick and wounded, originally seven in number, have been reduced to one, relegating the whole matter to the operation of the Geneva Convention. The articles relating to capitulations and armistices are also merely formal. Those concerning spies and flags of truce only profess to record existing military practice, as do the articles respecting sieges and bombardments. The twelve articles with regard to prisoners of war appear to be important only in so far as they show the manner in which the original objects of the Project, and the humane intentions of the Emperor of Russia, have become obscured in the attempt to devise general rules

of warfare. The articles themselves may possibly serve some useful purpose in recording the view taken by the delegates at Brussels of some details of the usual treatment of prisoners of war. From the spirit of compromise adopted in framing the articles, as mentioned by Baron Jomini, it is more than probable that a close scrutiny would show that many of the articles admit, or invite, differences of interpretation. It is hardly necessary to point out how serious would be the consequences should this be found to be the case in respect to the articles on belligerents interned and of wounded treated in neutral territory.

THE PROPOSED RULES.

PROJECT OF AN INTERNATIONAL DECLARATION CONCERNING THE LAW AND CUSTOMS OF WAR.

Of Military Authority over the Hostile State.

ART. 1.—A territory is considered as occupied when it is placed actually under the authority of the hostile army. The occupation only extends to those territories where this authority is established and can be exercised.

ART. 2.—The authority of the legal power being suspended, and having actually passed into the hands of the occupier, he shall take every step in his power to re-establish and secure, as far as possible, public safety and social order.

ART. 3.—With this object he will maintain the laws which were in force in the country in time of peace, and will only modify, suspend, or replace them by others if necessity obliges him to do so.

ART. 4.—The functionaries and officials of every class who at the instance of the occupier consent to continue to perform their duties shall be under his protection. They shall not be dismissed or be liable to summary punishment ('punis disciplinairement') unless they fail in fulfilling the obligations they have undertaken, and shall be handed over to justice only if they violate those obligations by unfaithfulness.

ART. 5.—The army of occupation shall only levy such taxes, dues, duties, and tolls as are already established for the benefit of the State, or their equivalent, if it be impossible to collect them, and this shall be done as far as possible in the form of, and according to, existing practice. It shall devote them to defraying the expenses of the administration of the country to the same extent as was obligatory on the legal government.

ART. 6.—The army occupying a territory shall take possession only of the specie, the funds, and marketable securities, &c. ('valeurs exigibles'), which are the property of the State in its own right, the depôts of arms, means of transport, magazines and supplies, and, in general, all the personal property of the State which is of a nature to aid in carrying on the war. Railway plant, land telegraphs, steam and other vessels not included in cases regulated by maritime law, as well as depôts of arms, and generally every kind of munitions of war, although belonging to companies or private individuals, are to be considered equally as means of a nature to aid in carrying on a war, which cannot be left by the army of occupation at the disposal of the enemy. Railway plant, land telegraphs, as well as the steam and other vessels above mentioned, shall be restored, and indemnities be regulated on the conclusion of peace.

ART. 7.—The occupying State shall only consider itself in the light of an administrator and usufructuary of the public buildings, real property, forests, and agricultural works belonging to the hostile State, and situated in the occupied territory. It is bound to protect these properties ('fonds

de ces propriétés') and to administer them according to the laws of usufruct.

ART. 8.—The property of parishes ('communes'), of establishments devoted to religion, charity, education, arts and sciences, although belonging to the State, shall be treated as private property. Every seizure, destruction of, or wilful damage to such establishments, historical monuments, or works of art or of science, should be prosecuted by the competent authorities.

Of Those who are to be recognised as Belligerents—Of Combatants and Non-Combatants.

ART. 9.—The laws, rights, and duties of war are applicable not only to the army, but likewise to militia and corps of volunteers complying with the following conditions: (1) That they have at their head a person responsible for his subordinates; (2) that they wear some settled, distinctive badge recognisable at a distance; (3) that they carry arms openly; and (4) that, in their operations, they conform to the laws and customs of war. In those countries where the militia form the whole or part of the army they shall be included under the denomination of 'Army.'

ART. 10.—The population of a non-occupied territory who, on the approach of the enemy, of their own accord take up arms to resist the invading troops, without having had time to organise themselves in conformity with Art. 9, shall be considered as belligerents, if they respect the laws and customs of war.

ART. 11.—The armed forces of the belligerents may be composed of combatants and non-combatants. In the event of being captured by the enemy, both one and the other shall enjoy the rights of prisoners of war.

Of the Means of Injuring the Enemy.

ART. 12.—The laws of war do not allow to belligerents an unlimited power as to the choice of means of injuring the enemy.

ART. 13.—According to this principle are strictly forbidden: (*a*) the use of poison or poisoned weapons; (*b*) murder by treachery of individuals belonging to the hostile nation or army; (*c*) murder of an antagonist who, having laid down his arms, or having no longer the means of defending himself, has surrendered at discretion; (*d*) the declaration that no quarter will be given; (*e*) the use of arms, projectiles, or substances ('matières') which may cause unnecessary suffering, as well as the use of the projectiles prohibited by the declaration of St. Petersburg in 1868; (*f*) abuse of the flag of truce, the national flag, or the military insignia or uniform of the enemy, as well as the distinctive badges of the Geneva Convention; (*g*) all destruction or seizure of the property of the enemy which is not imperatively required by the necessity of war.

ART. 14.—Stratagems (*ruses de guerre*) and the employment of means necessary to procure intelligence respecting the enemy or the country (*terrain*) (subject to Art. 36) are considered lawful means.

Of Sieges and Bombardments.

ART. 15.—Fortified places are alone liable to be besieged. Towns, agglomerations of houses, or villages, which are open or undefended, cannot be attacked or bombarded.

ART. 16.—But if a town or fortress, agglomeration of houses, or village, be defended, the commander of the attacking forces should, before commencing a bombardment, and except in the case of surprise, do all in his power to warn the authorities.

ART. 17.—In the like case, all necessary steps should be taken to spare, as far as possible, buildings devoted to religion, arts, sciences, and charity, hospitals, and places where sick and wounded are collected, on condition that they are not used at the same time for military purposes. It is the duty of the besieged to indicate these buildings by special visible signs, to be notified beforehand by the besieged.

ART. 18.—A town taken by storm shall not be given up to the victorious troops to plunder.

Of Spies.

ART. 19.—No one shall be considered as a spy but those who, acting secretly or under false pretences, collect or try to collect information in districts occupied by the enemy, with the intention of communicating it to the opposing force.

ART. 20.—A spy, if taken in the act, shall be tried, and treated according to the laws in force in the army which captures him.

ART. 21.—If a spy who rejoins the army to which he belongs is subsequently captured by the enemy, he is to be treated as a prisoner of war, and incurs no responsibility for his previous acts.

ART. 22.—Military men (*les militaires*) who have penetrated within the zone of operations of the enemy's army, with the intention of collecting information, are not considered as spies if it has been possible to recognise their military character. In like manner military men (and also non-military persons carrying out their mission openly) charged with the transmission of despatches, either to their own army or to that of the enemy, shall not be considered as spies if captured by the enemy. To this class belong also, if captured, individuals sent in balloons to carry despatches, and generally to keep up communications between the different parts of an army or of a territory.

Of Prisoners of War.

ART. 23.—Prisoners of war are lawful and disarmed enemies. They are in the power of the enemy's Government, but not of the individuals or of the corps who made them prisoners. They should be treated with humanity. Every act of insubordination authorises the necessary measures of severity to be taken with regard to them. All their personal effects, except their arms, are considered to be their own property.

ART. 24.—Prisoners of war are liable to internment in a town, fortress, camp, or in any locality whatever, under an obligation not to go beyond certain fixed limits; but they may not be placed in confinement (*enfermés*) unless absolutely necessary as a measure of security.

ART. 25.—Prisoners of war may be employed on certain public works which have no immediate connection with the operations on the theatre of war, provided the employment be not excessive, nor humiliating to their military rank if they belong to the army, or to their official or social position if they do not belong to it. They may also, subject to such regulations as may be drawn up by the military authorities, undertake private work. The pay they receive will go towards ameliorating their position, or will be placed to their credit at the time of their release. In this case the cost of their maintenance may be deducted from their pay.

ART. 26.—Prisoners of war cannot be compelled in any way to take any part whatever in carrying on the operations of war.

ART. 27.—The Government in whose power are the prisoners of war undertakes to provide for their maintenance. The conditions of such maintenance may be settled by a mutual understanding between the belligerents. In default of such an understanding, and as a general principle, prisoners of war shall be treated, as regards food and clothing,

on the same footing as the troops of the Government who made them prisoners.

ART. 28.—Prisoners of war are subject to the laws and regulations in force in the army in whose power they are. Arms may be used, after summoning, against a prisoner attempting to escape. If retaken, he is subject to summary punishment (*peines disciplinaires*) or to a stricter surveillance. If after having escaped he is again made prisoner, he is not liable to any punishment for his previous escape.

ART. 29.—Every prisoner is bound to declare, if interrogated on the point, his true names and rank, and in the case of his infringing this rule, he will incur a restriction of the advantages granted to the prisoners of the class to which he belongs.

ART. 30.—The exchange of prisoners of war is regulated by mutual agreement between the belligerents.

ART. 31.—Prisoners of war may be released on parole if the laws of their country allow of it, and in such a case they are bound on their personal honour to fulfil scrupulously, as regards their own government, as well as that which made them prisoners, the engagements they have undertaken. In the same case their own government should neither demand nor accept from them any service contrary to their parole.

ART. 32.—A prisoner of war cannot be forced to accept release on parole, nor is the enemy's government obliged to comply with the request of a prisoner claiming to be released on parole.

ART. 33.—Every prisoner of war liberated on parole and retaken carrying arms against the government to which he had pledged his honour, may be deprived of the rights accorded to prisoners of war, and may be brought before the tribunals.

ART. 34.—Persons in the vicinity of armies, but who do not directly form part of them, such as correspondents, newspaper reporters, 'vivandiers,' contractors, &c., may also be made prisoners of war. These persons should, however, be furnished with a permit issued by a competent authority, as well as with a certificate of identity.

Of the Sick and Wounded.

ART. 35.—The duties of belligerents with regard to the treatment of sick and wounded are regulated by the Convention of Geneva of August 22, 1864, subject to the modifications which may be introduced into that Convention.

Of the Military Power with Respect to Private Individuals.

ART. 36.—The population of an occupied territory cannot be compelled to take part in military operations against their own country.

ART. 37.—The population of occupied territories cannot be compelled to swear allegiance to the enemy's power.

ART. 38.—The honour and rights of the family, the life and property of individuals, as well as their religious convictions and the exercise of their religion should be respected. Private property cannot be confiscated.

ART. 39.—Pillage is expressly forbidden.

Of Contributions and Requisitions.

ART. 40.—As private property should be respected, the enemy will demand from parishes (communes) or the inhabitants only such payments and services as are connected with the necessities of war generally acknowledged in proportion to the resources of the country, and which do not imply, with regard to the inhabitants, the obligation of taking part in the operations of war against their own country.

ART. 41.—The enemy, in levying contributions, whether as equivalents for taxes (*vide* Art. 5), or for payments which should be made in kind, or as fines, will proceed, as far as possible, according to the rules of the distribution and assessment of the taxes in force in the occupied territory. The civil authorities of the legal Government will afford their assistance if they have remained in office. Contributions can be imposed only on the order and on the responsibility of the General-in-Chief, or of the superior civil authority established by the enemy in the occupied territory. For every contribution a receipt shall be given to the person furnishing it.

ART. 42.—Requisitions shall be made only by the authority of the commandant of the locality occupied. For every requisition an indemnity shall be granted, or a receipt given.

Of Flags of Truce.

ART. 43.—An individual authorised by one of the belligerents to confer with the other, on presenting himself with a white flag, accompanied by a trumpeter, bugler, or drummer, or also by a flag-bearer, shall be recognised as the bearer of a flag of truce. He, as well as the trumpeter (bugler or drummer), and the flag-bearer, who accompany him, shall have the right of inviolability.

ART. 44.—The commander to whom a bearer of a flag of truce is despatched is not obliged to receive him under all circumstances and conditions. It is lawful for him to take all measures necessary for preventing the bearer of the flag of truce taking advantage of his stay within the radius of the enemy's position to the prejudice of the latter; and if the bearer of the flag of truce is found guilty of such a breach of confidence, he has the right to detain him temporarily. He may equally declare beforehand that he will not receive bearers of flags of truce during a certain period. Envoys presenting themselves after such a notification from the side to which it has been given, forfeit their right to inviolability.

ART. 45.—The bearer of a flag of truce forfeits his right to inviolability, if it be proved, in a positive and irrefutable manner, that he has taken advantage of his privileged position to incite to or commit an act of treachery.

Of Capitulations.

ART. 46.—The conditions of capitulations shall be discussed by the contracting parties. These conditions should not be contrary to military honour. When once settled by a Convention they should be scrupulously observed by both sides.

Of Armistices.

ART. 47.—An armistice suspends warlike operations by a mutual agreement between the belligerents. Should the duration thereof not be fixed, the belligerents may resume operations at any moment; provided, however, that proper warning be given to the enemy, in accordance with the conditions of the armistice.

ART. 48.—An armistice may be general or local. The former suspends all warlike operations between the belligerents; the latter only those between certain portions of the belligerent armies, and within a fixed radius.

ART. 49.—An armistice should be notified officially and without delay to the competent authorities and to the troops. Hostilities are suspended immediately after the notification.

ART. 50.—It rests with the contracting parties to define in the clauses of the armistice the relations which shall exist between the populations.

ART. 51.—The violation of the armistice by either of the parties gives to the other the right of terminating it ('le dénoncer').

ART. 52.—The violation of the clauses of the armistice by private individuals, on their own personal initiative, only affords the right of demanding the punishment of the guilty persons, and, if there is occasion for it, an indemnity for losses sustained.

Of Belligerents Interned, and of Wounded Treated, in Neutral Territory.

ART. 53.—The neutral State receiving in its territory troops belonging to the belligerent armies will intern them, so far as it may be possible, away from the theatre of war. They may be kept in camps, or even confined in fortresses or in places appropriated to this purpose. It will decide whether the officers may be released on giving their parole not to quit the neutral territory without authority.

ART. 54.—In default of a special agreement, the neutral State which receives the belligerent troops will furnish the interned with provisions, clothing, and such aid as humanity demands. The expenses incurred by the internment will be made good at the conclusion of peace.

ART. 55.—The neutral State may authorise the transport across its territory of the wounded and sick belonging to the belligerent armies, provided that the trains which convey them do not carry either the *personnel* or *matériel* of war. In this case the neutral State is bound to take the measures necessary for the safety and control of the operation.

ART. 56.—The Convention of Geneva is applicable to the sick and wounded interned on neutral territory.

CHAPTER XXX

LICENSES TO TRADE

1. Character of licenses to trade—2. General licenses—3. Special licenses—4. Decisions on their authority and effect—5. Want of uniformity in British decisions—6. Representations of the grantee—7. Intentions of grantor—8. Persons entitled to use them—9. Where the grantee acts as agent for others—10. Character of the vessel—11. Exception of a particular flag—12. Change of national character during voyage—13. Protection before and after voyage—14. Quantity and quality of goods—15. Protection to enemy's goods—16. License to alien enemy—17. If cargo be injured—18. If it cannot be landed—19. Compulsory change of cargo—20. For importation does not protect re-exportation—21. Course of voyage—22. Change of port of destination—23. Intended ulterior destination—24. Condition to call for convoy—25. Capture before and after deviation—26. Time limited in license—27. License does not act retrospectively—28. If not on board, or not endorsed—29. Effect of alteration—30. Breach of blockade, &c., by licensed vessel.

Licenses to trade

§ 1. A LICENSE is a kind of safe-conduct, granted by a belligerent State to its own subjects, to those of its enemy, or to neutrals, to carry on a trade which is interdicted by the laws of war, and it operates as a dispensation from the penalties of those laws, with respect to the State granting it, and so far as its terms can be fairly construed to extend. The officers and tribunals of the State under whose authority they are issued, are bound to respect such documents as lawful relaxations of the ordinary state of war; but the adverse belligerent may justly consider them as *per se* a ground of capture and confiscation. Licenses are necessarily *stricti juris*, and cannot be carried beyond the evident intention of those by whom they are granted; nevertheless, they are not construed with pedantic accuracy, nor will their fair effect be vitiated by every slight deviation from their terms and conditions. Much, however, will depend upon the nature of the terms which are not complied with. Thus a variation in the *quality* or *character* of the goods will often lead to more dangerous consequences than an excess of *quantity*. Again, a license to trade, though

safe in the hands of one person, might become dangerous in those of another; so also with respect to the limitations of *time* and *place* specified in a license. Such restrictions are often of material importance, and cannot be deviated from with safety.[1] A license may be qualified, in which case the party seeking to protect himself under it must conform exactly to its requisitions. The questions which arose in the English Common Law courts upon the constructions of licenses, granted under statutes, are extremely various; they turned in many cases upon the precise words used, and most of these cases have been discussed in the Court of Admiralty by the very learned judge Sir William Scott. Licenses to trade were not issued by Great Britain during the Crimean war, 1854, but certain modifications were granted to neutral or friendly flags.[2]

A general license

§ 2. A *general license* is a suspension or relaxation of the exercise of the rights of war, generally or partially, in relation to any community or individuals, liable to be affected by their operation. It must emanate from the sovereignty of the State, for the supreme authority alone is competent to decide what considerations of political or commercial expediency will justify a suspension or relaxation of its belligerent rights. That branch of the government to which, from the form of its constitution, the power of declaring or making war is entrusted, has an undoubted right to regulate and modify, in its discretion, the hostilities which it sanctions. This may be done by a general ordinance, by instructions to armed vessels, or by licenses issued to certain communities or individuals exempting them from capture. In England, licenses are either granted directly by the Crown, or by some subordinate officer, to whom the authority of the Crown has been delegated, either by special instructions or under the provisions of an Act of Parliament. But the Lord-Lieutenant of Ireland as Viceroy cannot by proclamation or otherwise authorise a trading of British subjects with the enemy. In the United States,

[1] Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. xxi. § 14; the 'Abigail,' *Stewart V. Ad. R.*, 360; the 'Cosmopolite,' 4 *Rob.*, 8; the 'Twee Gebroeders,' 1 *Edw. R.*, 96; Schroeder *v.* Vaux, 15 *East.*, 52; Usparicha *v.* Noble, 13 *East.*, 332; Menett *v.* Bonham, 15 *East.*, 477; Flint *v.* Crokatt, *ibid.* 522.

[2] It was declared by Order in Council of April 15, 1854, that 'all vessels under a neutral or friendly flag, being neutral or friendly property, shall be permitted to import into any port or place in her Majesty's

as a general rule, licenses are issued under the authority of an Act of Congress, but in special cases and for purposes immediately connected with the prosecution of a war, they may be granted by the authority of the President, as commander-in-chief of the military and naval forces of the United States.[1]

A special license

§ 3. For the same reasons, a *special license* to individuals for a particular voyage, or for the importation or exportation of particular goods, must, as a general rule, also emanate from the supreme authority of the State. But there are exceptions to this rule growing out of the particular circumstances of the war in particular places. The governor of a province, the general of an army, or the admiral of a fleet may grant licenses to trade within the limits of their own commands,

dominions all goods and merchandise whatsoever, to whomsoever the same may belong; and to export from any port or place in her Majesty's dominions to any port not blockaded any cargo or goods, not being contraband of war, or not requiring a special permission, to whomsoever the same may belong; and save and except only, as aforesaid, all the subjects of her Majesty, and the subjects or citizens of any neutral or friendly State shall and may, during and notwithstanding the present hostilities with Russia, freely trade with all ports and places wheresoever situate, which shall not be in a state of blockade, save and except that no British vessel shall under any circumstances whatsoever, either under or by virtue of this order or otherwise, be permitted or empowered to enter or communicate with any port or place which shall belong to, or be in possession or occupation of, her Majesty's enemies.'

An Ionian subject was held not to be in the same position as a British subject for trading with Russia during the above-mentioned war. (The 'Ionian Ships,' 2 *Spinks Adm. and Eccl.*, 212; but qualified by the 'San Spiridione,' 2 *Jur. N. S.*, 1238.) See Esposito *v.* Bowden (7 *E. and B.*, 763), and the 'Odessa' (*Spinks Pr. R.*, 208), as to the effect of the above Order in Council (and of other similar proclamations) on the trade of a British subject with the enemy. If the license granted be conditional, it is incumbent on the party who seeks to protect himself under it to conform to its requisitions. (Vandyke *v.* Whitmore, 1 *East.*, 475.) If the conditions be only colourably complied with, the license will be avoided by reason of the fraud. (Gordon *v.* Vaughan, 12 *East.*, 302.) The licensing system was carried by England to a great extent, as an expedient for supporting her trade, in defiance of all obstacles created by the enemy, during the long wars with the Continental Powers of Europe and with the United States in the reign of Geo. III. (The 'Goede Hoop,' 1 *Edw. R.*, 327.)

[1] Duer, *On Insurance*, vol. i. pp. 355, 541, 594–619; Vandyke *v.* Whitmore, 1 *East.*, 475; Taulman *v.* Anderson, 1 *Taunt. R.*, 227; Shiffner *v.* Gordon, 12 *East.*, 296; the 'Charlotte,' 1 *Dod. R.*, 387.

A general license must be applied by evidence to the particular case in judgment; it makes part of the title of the party claiming to be licensed to show how he obtained possession of a license, which in the term of it is general; it makes part of the plaintiff's case against the underwriter to connect himself with the property insured, and to show that it was lawfully insured. (Rawlinson and others *v.* Janson, 12 *East.*, 223.)

and such documents are binding upon them and upon all persons who are under their authority, but they afford no protection beyond the limits of the authority of those who issue them. Thus, in the war between the United States and the Republic of Mexico, the governor of California and the commander of the Pacific squadron issued such licenses, but it was not pretended that such protection extended beyond the limits of their respective commands. The peculiar circumstances of the case, the great distance from the seat of the supreme federal authority, the scarcity of provisions and supplies, and the want of American vessels on that coast were deemed sufficient reasons for the exercise of that power.[1]

Judicial decisions on licenses

§ 4. But though by the general maritime law of the realm trading with an enemy is undoubtedly illegal, 'the Crown,' says Lord Ellenborough, C.J., 'may remit its rights in whole or in part, as it shall see fit.'[2] And this power of remission is the foundation of the licensing system, by which certain voyages with cargoes of enumerated articles are legalised on the petition of merchants to the Board of Trade; the licenses directing the commanders of all British ships of war and privateers not to interrupt the vessel therein named and so laden. In times of war positive statutes are usually passed to prohibit commercial intercourse with the enemy, and to regulate the issue of licenses, which are always construed rigorously against the grantees, so that any want of conformity in the terms and conditions of a license is fatal to the protection which would otherwise have been derived from it.

Licenses have frequently been granted during the operations of a war, not only for the protection of an enemy trading in the country of a belligerent, but to authorise subjects to trade with the enemy; and the cases relative to their authority and legal effect are numerous, both in the reports of courts of Admiralty and of common law. The leading case on this subject is that of the 'Hope,' an American ship, laden with

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 27; *Letter of Secty. of California*, 31st Cong., 1st sess. H. of R., Ex. Doc., No. 17, p. 671; Cushing, *Opinions of U.S. Attys.-Gen.*, vol. vi. p. 630.

[2] Maule *v.* Selwyn, 29. King William III., in his declaration of war against France, excepted all the French Protestants. Wells *v.* Williams, 1 *Lord Raymond's Reports*, 283; and see 2 *Robinson's Admiralty Reports*, 163.

corn and flour, and captured whilst proceeding from the United States to the Spanish peninsula, under the protection of instruments granted by the English admiral on the Halifax station, and the British consul at Boston. In pronouncing judgment in that case, Sir William Scott remarked, that no consul in any country, particularly in an enemy's country, is vested with power, in virtue of his office, to exempt the property of enemies from the effects of hostilities; and that an admiral could restrain the ships under his immediate command from committing acts of hostility, but could grant no safe-conduct of this kind beyond the limits of his own station. But such acts might be regarded as *sponsiones*, or agreements *sub spe rati*, to which a subsequent ratification, by the proper authority, would give validity. It was shown that these acts of its officers had been confirmed by an Order in Council, and a restitution of the property was decreed accordingly. But, in the case of the 'Charles,' and other similar cases, where the safe-conducts had been signed by an English admiral, and also by the Spanish minister in the United States, but not confirmed by the British Government, it was decided that the licenses afforded no protection, being issued without proper authority. So, also, in cases of safe-conducts granted by the British minister, in the United States, to American vessels sailing with provisions to the island of St. Batholomew. All were condemned where the licenses were not expressly included within the terms of the confirmation by the Order in Council.[1]

Want of uniformity in English decisions

§ 5. There are very few American decisions on the subject of licenses, and there is some want of uniformity in those of the British Admiralty. Prior to the peace of Amiens licenses were regarded as an act of special grace, and most strictly interpreted, but, on the renewal of the war, the issuing of licenses by England was regarded as a matter of national policy, rather than personal favour. The courts, in consideration of this policy, gave to these instruments the largest interpretation possible. Most of the reported cases on the subject of licenses were decided during the period that this liberal doctrine prevailed, and in many of them it is a matter of extreme difficulty to say, whether the determination was governed by the peculiar circumstances and character of the

[1] The 'Hope,' 1 *Dod. R.*, 226; Johnson *v.* Sutton, *Doug. R.*, 254.

war, or by reasons of general and permanent application. It is evident, however, that it is only rules of a permanent character that can be justly said to form a part of the existing law, and that it would be useless to state those that were, in truth, occasional exceptions, arising from a state of things so extraordinary that it is highly improbable it will ever again occur.[1]

Representations of grantee

§ 6. The validity of a license depends not only on the sufficiency of the authority by which it is granted, but also on the good faith of the party to whom it is issued. Like every other grant, although issued in due form, and by the proper authority, a license may be vitiated by fraudulent conduct in obtaining it. The misrepresentation or suppression of material facts—of facts that, if known, would probably have influenced the discretion of the grantor—renders the license a nullity, and exposes the property it is invoked to protect to certain condemnation. Nor is it necessary, in order to invalidate the license, that such misrepresentations or suppressions of material fact should, in all cases, involve an imputation or suspicion of fraud. Thus, where the agent who procured the license was described as a merchant of London, but it appeared on trial that, when the license was granted, he was, in fact, a resident of a foreign country, the error was held to invalidate the license. So, where a license was granted to a person by name, describing him as a British merchant, and it was found that he, in person, visited Holland, at that time an enemy's country, mixed and incorporated himself, when there, in the national commerce, and exported the goods as a Dutch merchant, instead of importing them as an English merchant, the license was regarded as invalidated and his property confiscated.[2]

Intentions of grantor

§ 7. Although a license may have been issued by competent authority, and on the good faith of the party obtaining it, in order to render it available for the protection of the property to which it relates, the intentions of the grantor, as expressed in the license, must be pursued in its mode of execution, and there must be an entire good faith on the

[1] The 'Goede Hoop,' 1 *Edw. R.*, 328; the 'Juno,' 2 *Rob.*, 117; Morgan *v.* Oswald, 3 *Taunt. R.*, 555; Flindt *v.* Scott, 5 *Taunt. R.*, 693.

[2] The 'Clio,' 6 *Rob.*, 69; the 'Jonge Klassina,' 5 *Rob.*, 269; Klingender *v.* Bond, 14 *East.*, 484, in which case the objection is said to have been considered immaterial at the licensing office in England.

part of the user in executing it. And although, as before remarked, licenses are not to be construed with a literal and pedantic accuracy, yet no greater latitude of interpretation is permitted than corresponds with the intentions of the grantor, fairly understood; no other or greater deviation is allowed, than it may be justly presumed the grantor, with a knowledge of the circumstances, would himself have sanctioned. 'It is a mistake,' says Duer, 'to suppose that the rights of the user may not be prejudiced by a construction of the grant that is merely erroneous. It is absolutely essential, that the will of the grantor shall be observed; so that, that only shall be done which he intended to permit; whatever he did not mean to permit is absolutely interdicted. Hence, the party who uses the license engages, not only for fair intentions, but for an accurate interpretation and execution of the grant.'[1]

Persons entitled to use a license

§ 8. The *first* material circumstance to be considered in the execution of a license, with respect to the intentions of the grantor and the good faith of the user, is, *the persons entitled to use it.* A license is not a subject of transfer or assignment, and however general may be the terms in which the grantees are described, those who claim for their property its protection must show that the application on which it was issued was made in their behalf, and that the applicant named in the license was, in truth, their agent. But if granted to a particular person by name, in behalf of himself and others, it is not necessary that the person named should have any share or interest in the property to which the license relates; it is sufficient if he acted as agent of those to whom its exclusive use is appropriated. If the license is, by express words, made negotiable, or if no mention whatever is made of the persons upon whose application it is granted, or by whom it is to be used, it is a legitimate subject of transfer and sale, and the purchaser is as fully protected as if it had been granted to him on his personal application.[2]

[1] Duer, *On Insurance*, vol. i. pp. 598, 599; the 'Jonge Johannes,' 4 *Rob.*, 263; the 'Vriendschap,' 4 *Rob.*, 96.

[2] Warin *v.* Scott, 4 *Taunt. R.*, 605; Robinson *v.* Morris, 5 *Taunt. R.*, 725; Barlow *v.* M'Intosh, 12 *East.*, 311; Busk *v.* Bell, 16 *East.*, 3; Rawlinson *v.* Janson, 12 *East.*, 223; the 'Acteon,' 2 *Dod. R.*, 48; the 'Louise Charlotte,' 1 *Dod. R.*, 308; Fenton *v.* Pearson, 15 *East.*, 419.

A license from the king to a particular person to import commo-

Where the grantee acts as agent for others

§ 9. But where the license is not made negotiable, and the persons named in the license obtained it in their own names and not as the representatives and agents of others—the license being *for themselves, their agents, or holders of their bills of lading*—it cannot protect the property of others for whom the grantees act as agents, and in which they are not interested. Thus, a license to B. and S. and their agents will not protect the property of others for whom B. and S. may see fit to act as agents. But where a license is issued to B., S., and Co., meaning under that denomination to include persons who had agreed to take part in the shipment made under such license, such persons are held to be protected.[1]

Character of vessel

§ 10. The *second* point to be considered, in determining upon the proper execution of a license, is *the character of the vessel.* The national character of the ship, as described in the license, is, in most cases, a condition necessary to be fulfilled. Where the license directs the employment of a neutral vessel belonging to a particular nation, the substitution of a neutral

dities of a certain description, being the property of the person specified, cannot be assigned so as to authorise the importation of goods which are the property of the assignee. (Fleize *v.* Thompson, 1 *Taunt.*, 121.) So, where the goods licensed were, by the terms of the license, to be 'the property of J. B. and Sons, as specified in their bills of lading,' it was considered that the goods were not protected by a general bill of lading consigned to B., who possessed not even a qualified property; the absolute bill of lading being transmitted to other persons as the particular consignees. (Fleize *v.* Walters, 2 *Taunt.*, 248.) A native Spaniard, domiciled in Great Britain in time of war, between that country and Spain, having been licensed in general terms by the king to ship goods in a neutral vessel from thence to certain parts of Spain, was held competent to effect an insurance on goods embarked in the protected commerce, and to sue in his own name on such insurance, as well in respect of his own interest as for the benefit of his correspondents abroad. (Usparecha *v.* Noble, 13 *East.*, 332.) Where a license contains the words 'to whom the property may appear to belong' all enquiry into the proprietary interest in the cargo is excluded; so that even goods of the enemy are protected and restored under such a clause. But the Court never restores hostile property found on board a licensed ship, unless the words in question occur in the license. (The 'Cousine Marianne,' 1 *Edw.*, 346.) In Lemche *v.* Vaughan (1 *Bing.*, 473) the party obtaining the license was a foreign merchant who was therein described as 'of London.' At the time of the issue of the license he intended to reside in London, but had not actually come; and the Court of Common Pleas held that this misdescription did not vitiate the license, Lord Gifford, C.J., stating that these instruments were entitled to receive a liberal construction, as the object of them was to legalise the adventure, rather than to qualify the party applying.

[1] The 'Jonge Johannes,' 4 *Rob. R.*, 263; the 'Christina Sophia,' 4 *Rob.*, 267.

ship of a different State, standing in the same political relations to the belligerent powers, would, probably, not be regarded as prejudicial. The same may be said of the employment of two ships, when the terms of the license refer only to one, if both vessels bear the same national character, and there be no variation in the quantity or quality of the goods described in the license. But, in both these changes, a good and satisfactory cause must be shown. If a neutral ship is mentioned in the license, the employment of a ship of the State issuing the license is considered an essential deviation, which will lead to a condemnation. So the employment of a ship belonging to the enemy, when not authorised by the license, is in all cases noxious and fatal. When the license authorises the importation of goods from an enemy's country, in an enemy's ship, although confined, in terms, to the goods, by the just construction of law, it is extended to the vessel also. For the necessary effect of such a license is to legalise the voyage as described, in all its incidents, and hence the ship is just as much a legitimate object of protection as the cargo which is to be brought in it.[1]

Exception of a particular flag

§ 11. When the license authorises the transportation of goods by any ship or ships except those under the flag of a particular nation, the exception refers to the *fact* of the nationality of the ship, not merely to the external signs. Although the vessel may be documented as belonging to, and actually bear the flag of, another State, if it be shown that she really belonged to the excepted nation, she will not be protected by the license and the flag. The reason of this rule is, that vessels of the excepted nation might otherwise engage in the prohibited navigation, by substituting a foreign flag for their own. But the unauthorised employment of

[1] Kensington *v.* Inglis, 9 *East.*, 273; the 'Dankbaarheit,' 1 *Dod. R.*, 183; the 'Vrow Cornelia,' 1 *Edw. R.*, 340; the 'Jonge Arend,' 5 *Rob.*, 14; the 'Goede Hoffnung,' 1 *Dod. R.*, 257; the 'Bourse,' 1 *Edw. R.*, 369; the 'Speculation,' 1 *Edw. R.*, 344; the 'Hoffnung,' 2 *Rob.*, 162. A privilege given by Act of Parliament to ships belonging to any State in amity with Great Britain and manned with foreigners, to import merchandise, otherwise prohibited, does not extend to foreign-built ships, British owned. (Attorney-General *v.* Wilson, 3 *Price*, 431.)

A ship, foreign-built (American), belonging wholly to a British subject, and manned with foreign seamen (with an English mate), was not within the 43 Geo. III., c. 153, entitled to import flax seed from Russia. (Attorney-General *v.* Wilson, 3 *Price*, 431.)

such excepted vessels is not permitted to affect the goods of shippers who were not privy to the deception, or cognisant of the fact. Where there is no ground for imputing to them a voluntary departure from the conditions of the license in this respect, their property, if embraced by its terms, retains its protection. The vessel itself is condemned.[1]

Change of national character during voyage

§ 12. Again, if the vessel was, in fact, not of the excepted nation when she sailed, but became so during the voyage, by some unexpected change of circumstances, as the conquest or annexation of the country to which she belongs, by the excepted State, such change of political relations will not deprive her of the protection of the license, where the parties have acted fairly under it. Thus, where the license was for a ship bearing any other flag than that of France, and the owners had become French subjects during the voyage by the sudden annexation to France of the port and territory in which they resided, it was held by Sir William Scott, that the ship continued under the protection of the license, notwithstanding this change of national character.[2]

Protection before and after voyage

§ 13. A license to a vessel to import a particular cargo is held to protect a vessel, in ballast, on her way to the port of lading, for the express purpose specified in the license. So, also, a license to export a cargo to an enemy's port covers the ship, in ballast, on her return. In each of these cases the voyage to which the license is extended by implication has a necessary connection with that to which it expressly relates. But the protection extends no further than is *necessarily* implied in the license; the taking of any part of a cargo on board in the outward voyage in the case of importation, or in the return voyage in the case of exportation, subjects both ship and goods to confiscation.[3]

§ 14. The *third* point to be considered in the execution of

[1] The 'Bourse,' 1 *Edw. R.*, 370; the 'Dankbaarheit,' 1 *Dod. R.*, 183. But a license granted to a vessel to sail in ballast from London to Holland, which country was at that time in a state of hostility, notwithstanding anything contained in the British Order in Council of April 20, 1809, was held not to protect a ship which was the property of an alien enemy, and the insurance on the vessel was determined to be void. (Gregg *v.* Scott, 4 *Campb.*, 339.) In this case the license appears to be only a dispensation with the Order in Council, and was not intended as a remission of the belligerent rights of the Crown.

[2] Duer, *On Insurance*, vol. i. pp. 599, 612.

[3] Le Cheminant *v.* Pearson, 4 *Taunt. R.*, 367; the 'Freindschaft,' *Dod. R.*, 316.

a license is *the quality and quantity of goods it protects.* A small excess in quantity, or the partial substitution of those of a different quality, if free from the imputation of concealment or fraud, will not absolutely vitiate the license, under the colour of which they were introduced. The goods not protected by it are condemned, while those which it is admitted to embrace are restored. If the excess in quantity be very small, and not attributable to design, it is intimated by Sir William Scott, that it would not be regarded as an essential deviation; but any change in the quality of the goods cannot be justified or excused, and the articles not protected by the license are condemned. The fraudulent application of a license to cover or conceal goods not intended by the grantor renders it wholly void, and exposes to confiscation even the goods that are embraced in its terms. Thus, where a vessel was licensed to proceed only with a cargo of corn on the voyage described, and a quantity of firearms was stowed under the cargo for concealment, both ship and cargo were condemned:[1]

Quality and quantity of goods

§ 15. It was at one time held, that express words were necessary to protect the property of an *enemy*; but it was finally decided by the Court of Exchequer chamber, that a license containing the words, 'to whomsoever the property may appear to belong,' included goods shipped on accoun' of enemy's subjects. But Duer expresses a doubt whethe. this last decision was not to be referred to the peculiar circumstances of the war, and to be regarded as the fruits of the extreme liberality of construction which prevailed in England at that particular time.[2]

Protection to enemy's goods

[1] Wildman, *Int. Law*, vol. ii. pp. 256, 257; the 'Jonge Clara,' 1 *Edw. R.*, 371; the 'Juffrow Catharina,' 4 *Rob.*, 141; the 'Nicoline,' 1 *Edw. R.*, 363; the 'Vriendschap,' 4 *Rob.*, 96; the 'Goede Hoop,' *Edw. R.*, 336; the 'Catharina Maria,' *Edw. R.*, 337; the 'Wolfarth,' 1 *Edw. R.*, 365; the 'Seyerstadt,' 1 *Dod. R.*, 241; Kier *v.* Andrade, 6 *Taunt. R.*, 498.

[2] Duer, *On Insurance*, vol. i. pp. 604, 605; the 'Cousine Marianne,' 1 *Edw. R.*, 346; the 'Hoffnung,' 2 *Rob.*, 162; the 'Beurse van Koningsberg,' 2 *Rob.*, 169; Mennett *v.* Bohnam, 15 *East. R.*, 477; Usparicha *v.* Noble, 13 *East. R.*, 332; Foyle *v.* Bourdillon, 3 *Taunt. R.*, 546; Feise *v.* Bell, 4 *Taunt. R.*, 478; Anthony *v.* Moline, 5 *Taunt. R.*, 711; Schnakoneg *v.* Andrews, 5 *Taunt. R.*, 716; Robinson *v.* Touray, 1 *M. and Sel. R.*, 217; Hullman *v.* Whitmore, 3 *M. and Sel. R.*, 337.

A license granted to certain British subjects on behalf of themselves and others to export in a specified ship, bearing any flag except the French, a cargo from London to Archangel, being an enemy's port, and to import from thence, in the same ship, certain articles of a particular

License to an alien enemy

§ 16. A license to an alien enemy removes all his personal disabilities, so far as is necessary for his protection in the particular trade which is rendered lawful by the operation of the license. In respect to the voyage and trade which the license is intended to authorise and cover, he is not to be regarded as an enemy, but has all the legal privileges of a subject. So far as that particular voyage, trade, or cargo is concerned, he has a *persona standi* in all the courts, and may maintain suits in his own name, the same as a subject. Where a license is granted to an enemy, it operates as a partial suspension of the war, it being laid down by public writers on the law of nations, that the party so licensed is to be considered as if in amity with the sovereign who grants the license.[1]

description to any port in the United Kingdom, notwithstanding all the documents which accompanied the ship and cargo may represent the same to be destined to any neutral or hostile port, and to whomsoever such property may appear to belong (*Edw.* 20), is considered capable of protecting a cargo, either outwards or homewards, which is either in whole or in part the property of an alien enemy. (Hulkman *v.* Whitmore, 3 *M. and S.*, 100, 307.)

So a license granted to C. and H., who were shipowners in London, on behalf of themselves and British or neutral merchants, to load and export a cargo on board the Russian ship 'Fortuna,' from London to any port in the Baltic not under blockade, was held to protect Russian property exported from this country on a voyage to a Russian port, Russia being at war with Great Britain. (Rucher *v.* Anstey, 5 *M. and S.*, 25.)

[1] Bynkershoek, *Quæstiones Juris Publici*, lib. i. c. 3, cited 8 *East. R.*, 287; Morgan *v.* Oswald, 3 *Taunt. R.*, 555; Usparicha *v.* Noble, 13 *East. R.*, 332; Flindt *v.* Scott, 5 *Taunt. R.*, 674; 15 *East. R.*, 525; Fenton *v.* Pearson, 15 *East. R.*, 419.

'His Majesty,' says Lord Comyn, 'may grant letters of safe-conduct to an enemy, and by this means take him into his keeping and protection;' see *Com. Dig. Prerog.*, B. 5; Wells *v.* Williams, 1 *Salk.*, 46; and independently of letters of safe-conduct or passports, a person residing in this country by the license and under the protection of the Sovereign is not to be regarded as an alien enemy. See Wells *v.* Williams, 1 *Ld. Raym.*, 282. In like manner, an insurance may be effected upon the interest of an alien enemy under the protection of a license from the Crown. (Hullman *v.* Whitmore, 3 *M. and S.*, 338.)

In the course of the wars of 1810, the conflicting relations in which the different States of Europe were placed towards one another by the overruling power of France rendered it necessary for the interest of Great Britain that the prerogative of granting licenses should be frequently called into exertion. Acts of Parliament were also passed, by which powers were given, during the war, to the King in Council, and to the Secretary of State, to a greater extent than the King's prerogative was alone sufficient to authorise; and, in particular, of granting in certain conjunctures dispensations from the navigation laws, which, being the statutes of the realm, could not be encroached upon by the unassisted

If cargo be injured

§ 17. The protection of a license is not limited, in all cases, to the cargo originally shipped; for if the original cargo should be accidentally injured or spoiled, it may be replaced by a second one, *precisely corresponding* with that described in the license. A license, says Wildman, was granted to a neutral vessel to import a specified cargo from Amsterdam; the ship having taken on board her cargo, sailed from Amsterdam, but was obliged to put into Medemblick, which bears the same relative situation to Amsterdam that Gravesend does to London. At Medemblick it was necessary to unload the cargo, which was found to be so much damaged that it was not fit to be put on board again. The old cargo was therefore sold, and a new one of the same identical nature with the first, corresponding with it both in substance and quality, was put on board. It was held that, under these circumstances, the parties were not deprived of the protection of the license. The case would have been widely different, if goods of a different description had been taken instead of

prerogative of the Crown. (See Shiffner *v.* Gordon, 12 *Rast.*, 296; and statutes of George III., 4, c. 3; 45, c. 34; 47, c. 37; 48, c. 47; 48, c. 153; 49, c. 25; 49, c. 60.) The licenses so issued were in general granted to British subjects, but sometimes to alien enemies, and generally for certain voyages either to or from an enemy's country, either to export commodities with which the British markets were overstocked, or to import such articles as they stood in need of. Much contrariety of opinion existed with respect to the construction to be put on these licenses, and in particular on the subject whether to any, and to what extent a license of this kind operated to remove the personal disabilities of an alien enemy who may be interested in the property: being a high act of sovereignty, care must be taken that the license is not extended beyond the intention of the power from which it emanated, and that it is not by too great a latitude of interpretation made auxiliary to the purpose of fraud.

But subject to this limitation the rule was that the license should receive a liberal construction to effectuate the purpose for which it was intended, and that the terms which it contained were not to be limited in construction where the adventure contemplated had been fairly pursued. It should be remembered that a license is granted not so much for the benefit of the individual upon whom it is conferred, as for the promotion of the national interest; and the strictness of interpretation, which may be applicable in the case of a grant of property from the Crown, cannot be exercised towards such an instrument. A license of this nature, legalising a particular adventure, incidentally legalises all the measures necessary to be adopted for its due and effectual prosecution; it therefore implicitly allows a person whose commerce it authorises, although he be an alien enemy, to protect his interest by insurance; and a British agent, in whose name the insurance is effected, may bring an action upon the policy even during the continuance of war. (Kensington *v.* Ingles, 8 *East.*, 273.)

the original cargo. Here the original purpose was pursued; no new speculation was originated, nor was there any change, except such as was produced by time, and unavoidable accidents.[1]

If it cannot be landed

§ 18. A license to export goods to an enemy's port, although limited in terms to the outward voyage, is sufficient to protect both ship and cargo on the return, if the delivery of the goods at the port of destination was prevented by some inevitable accident, as a blockade, or a reasonable apprehension of seizure. But to entitle himself to the benefit of this liberal construction, the claimant must prove that the goods brought back are the identical goods exported under the license.[2]

Compulsory change of cargo

§ 19. It is never admitted as a valid excuse for receiving on board goods not permitted in the license, that compulsion had been used by the hostile government, and that they were received only to avoid the seizure of the vessel. If such an excuse were admitted, it would open the door to fraud and collusion, as it would be difficult, if not impossible, to discover whether such a transaction, taking place in an enemy's port, was voluntary or not.[3]

License to import no protection for re-exportation

§ 20. Where a license is given expressly for *importation*, it is held that it can be used for that purpose only, and not for re-exportation. Although the application should be made for a license to import, for the particular and special purpose of re-exportation, the permission to import would extend no further than was expressed in the instrument itself. So, also, a license to import for the purpose of exportation, with condition of putting cargo in government warehouses, as security for re-exportation, must be strictly complied with. Such a license does not cover importations for sale.[4]

Course of voyage

§ 21. The *fourth* point to be considered in determining the due execution of the license is, *the course and route of the voyage*. The requisitions of a license as to the port of ship-

[1] Wildman, *Int. Law*, vol. ii. p. 258; the 'Wolfarth,' 1 *Dod. R.*, 305; Siffkin *v.* Glover, 4 *Taunt. R.*, 717.

[2] The 'Jonge Frederick,' 1 *Edw. R.*, 357. In time of war Switzerland and other interior countries have been allowed to export and import through an enemy's port, but strict proof of property has been required. (The 'Magnus,' 1 *Rob.*, 32.)

[3] Duer, *On Insurance*, vol. i. p. 608; the 'Catharina Maria,' *Edw. R.*, 337; the 'Seyerstadt,' 1 *Dod. R.*, 241.

[4] The 'Vrouw Deborah,' 1 *Dod. R.*, 160.

ment or delivery, of departure or destination, must be strictly followed. The same may be said, in general, with respect to the course of the voyage. If the license directs that the ship shall stop at a particular port for convoy, the neglect or omission to comply with the direction invalidates the license. The same result would follow the touching for orders at an interdicted port; but a deviation, for the same purpose, to a neutral or other port not forbidden, although not authorised, seems not to impair the legal effect of the license. Any deviation from the prescribed course of the voyage, if produced by stress of weather, or other unavoidable accident, does not invalidate the license; if the necessity is proved, it is deemed a valid excuse.[1]

Change of destination

§ 22. An enemy's ship and cargo, belonging to the same owner, and licensed to go to Dublin, were taken going to Leith, a place not named in the license, and to be reached by a course totally different from that indicated; both ship and cargo were condemned. The party not being within the terms of the license, the character of enemy revives, and the property, thus become hostile, is subject to the ordinary rule of confiscation.[2]

Intended ulterior destination

§ 23. An *intended* ulterior destination does not vitiate the protection of a license, if the parties keep within the terms expressed and intended by the instrument. Thus, a vessel had a license to import a cargo into Leith from a port of the enemy, with an ulterior destination to Bergen. It was held that such ulterior destination did not vitiate the license for the voyage to Leith; but had the vessel been captured after completing the licensed part of the voyage, and on the way from Leith to Bergen, the license would have afforded her no protection.[3]

Condition to call for convoy

§ 24. The condition introduced in the license, that the vessel shall stop at a particular port for convoy, is regarded as fundamental, and the breach of it as fatal. The reason for introducing the condition is that the vessel may be subject to inspection in that part of her navigation. In a case where the

[1] The 'Europa,' 1 *Edw. R.*, 341; the 'Minerva,' 1 *Edw. R.*, 375; the 'Emma,' 1 *Edw. R.*, 366; the 'Twee Gebroeders,' 1 *Edw. R.*, 97; the 'Byfield,' 1 *Edw. R.*, 188.

[2] The 'Manly,' 1 *Dod. R.*, 257; the 'Edel Catharina,' 1 *Dod. R.*, 55; Wainhouse *v.* Cowie, 4 *Taunt. R.*, 178.

[3] The 'Henrietta,' 1 *Edw. R.*, 363.

admiral, under whose direction the convoy was to be furnished, ordered a deviation for the purpose of taking convoy at another place, the court felt itself bound to uphold the acts of the admiral. Such a deviation was placed on the same ground as that caused by stress of weather.[1]

Capture before and after deviation

§ 25. The effect of a deviation from the direct voyage described in the license, by touching at an intermediate port, depends in some degree upon the time of capture. If such vessel be seized on her way to such intermediate port, the presumption of law is that she was going thither for the purpose of violating the license. But if taken after leaving the intermediate port, with the identical cargo which she carried in, and while actually proceeding for her lawful destination, the presumption of *mala fides* would be removed. Touching at an *interdicted* port vitiates the license, unless expressly permitted in the license itself.[2]

Time limited in license

§ 26. The *fifth* point to be considered is *the time limited in the license.* There is a material distinction between the construction of a license for the exportation of goods to an enemy's port, and one for an importation merely. Where the license requires that the goods to which it relates shall be exported on or before a certain day, a delay for a single day beyond that which is specified, renders the license wholly void. But not so with respect to importations. If the party having a license be prevented from commencing the voyage, or be delayed in its prosecution by stress of weather, the acts of a hostile government, or other similar cause, over which he has no control, the time thus consumed is not to be considered in computing the period that the government intended to allow. But if he takes upon himself, at his own discretion, to extend the period specified, he loses the protection to which he would otherwise have been entitled.[3]

Where, in a license to export from London to Calais 100 hogsheads of tobacco, it was provided that the license should

[1] The 'Minerva,' *Edw. R.*, 375; the 'Anna Maria,' 1 *Dod. R.*, 209.

[2] The 'Europa,' 1 *Edw. R.*, 342; the 'Frau Magdalena,' 1 *Edw. R.*, 367; the 'Hoppet,' 1 *Edw. R.*, 369.

[3] The 'Sarah Maria,' 1 *Edw. R.*, 361; the 'Diana,' 2 *Act. R.*, 34; the 'Æolus,' 1 *Dod. R.*, 300; Williams *v.* Marshall, 6 *Taunt. R.*, 390; Tullock *v.* Boyd, 7 *Taunt. R.*, 468; Freeland *v.* Walker, 4 *Taunt. R.*, 478; Effurth *v.* Smith, 5 *Taunt. R.*, 329; Siffken *v.* Glover, 4 *Taunt. R.*, 77; Leevin *v.* Cormac, 4 *Taunt. R.*, 483; Siffken *v.* Allnut, 1 *M. and Sel.*, 39; Groning *v.* Crockatt, 3 *Camp. R.*, 55.

remain in force for two months from the date, and no longer, it was held to be not sufficient that the goods were shipped before the expiration of the time; and the license having expired before the voyage commenced, the Court of King's Bench decided that the exportation of the goods could not be protected by it.[1] Again, no mistake as to the necessity of a license, and no presumption as to the harmlessness of any particular commercial venture, will have the slightest effect in saving British property from condemnation, when captured on an unlicensed voyage of trade with the enemy. 'By the law and constitution of this country,' says Lord Stowell, 'the Sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine on the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcileable with the general interest of the State. It is for the State alone, on more enlarged views of policy, and of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Who can be more insensible to the consequences that might follow if every person, in time of war, had a right to carry on commercial intercourse with the enemy, and, under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience, on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of the public safety?'[2]

[1] Vandyck *v.* Whitmore, 1 *East. R.*, 475.

[2] Per Lord Stowell, 1 *Rob.*, 199.

A license for a voyage from the enemy's country, though granted after the voyage is commenced, is sufficient to legalise the voyage as against any persons who become captors after the date of the license.

A license has no retrospective action

§ 27. A license does not act retrospectively, and cannot take away any interest which is vested by law in the captors. Thus a vessel was captured on January 24, with an expired license on board. Another license was obtained, and its date carried back to January 20. It was held by the court that the vessel at the time of capture was not protected either by the license which had expired or by that subsequently obtained.[1]

If not on board, or not endorsed

§ 28. Moreover, a license, not on board at the time of capture, but afterwards endorsed for it by the shipper, is no protection. If the license be general in its terms, the mere fact of its being found on board is not sufficient, unless it has been appropriated to such ship by an endorsement to that effect, or by some positive evidence that this application was intended by the parties entitled to its use. These rules are obviously necessary to prevent a misapplication of the license by persons not having a right to avail themselves of its protection.[2]

If its date be altered

§ 29. A license is vitiated and becomes a mere nullity by an alteration of its date. In this respect licenses are governed by the same rules as other grants issued by the supreme power of the State; they are utterly vitiated by any fraudu-

(Henry *v.* Stanniforth, 4 *Campbell R.*, 270.) A vessel homeward-bound on a licensed voyage is also not liable to condemnation while proceeding on such voyage, though the time limited by the license has expired. (The 'Actæon,' 2 *Dod. R.*, 53.) But in such a case proof must be given of circumstances, such as an embargo, or the force of the elements, or other reasonable impediments, which will explain the delay, in order to protect from British cruisers a vessel found at sea on an illegal voyage after her license has expired. (The 'Goede Hoop,' *Edw. R.*, 327.) And as a general rule it is to be understood that, where no fraud appears to have been committed or meditated, and where the parties have been prevented from carrying the license into literal execution by a power which they could not control, they will be entitled to the benefit of its protection against seizure, although the terms may not have been literally and strictly fulfilled.

[1] Duer, *On Insurance*, vol. i. p. 618; Wildman, *Int. Law*, vol. ii. p. 265; the 'Vrouw Deborah,' 1 *Dod. R.*, 160; the 'St. Ivan,' *Edw. R.*, 376; the 'Edel Catharina,' 1 *Dod. R.*, 45; Henry *v.* Stanniforth, 4 *Camp. R.*, 270.

[2] The 'Speculation,' *Edw. R.*, 344; the 'Fortuna,' *Edw. R.*, 236; the 'Carl,' *Edw. R.*, 339. Where a license had been burnt intentionally, but under a mistake, the Vice-Admiralty Court of Nova Scotia, upon proof of the fact, ordered the vessel to be restored, the captors' expenses being first paid. (The 'Frederick Augustus' (1813), *J. Stewart's Vice-Ad. R. of Nova Scotia*, 486.)

lent alteration, and any change is *primâ facie* fraudulent. It may, however, be explained.[1]

Breach of blockade, &c., by a licensed vessel

§ 30. A license to trade with a port of the enemy does not serve as a protection for a breach of blockade, in case the port is blockaded; nor does it afford any protection for carrying goods contraband of war, enemy's despatches, or military persons, or for a resistance of the right of visitation and search; in fine, it can cover no act not expressly mentioned in the license or implied as a means necessary for its execution.[2]

[1] The 'Louise Charlotte,' 1 *Dod. R.*, 308; the 'Aurora,' 4 *Rob.*, 218; the 'Diana,' 2 *Act. R.*, 54.

[2] The 'Nicoline,' 1 *Edw. R.*, 364; the 'Actæon,' 2 *Dod. R.*, 54; the 'Byfield,' 1 *Edw. R.*, 190.

CHAPTER XXXI

RIGHTS AND DUTIES OF CAPTORS

1. Of captures generally—2. Of maritime captures—3. The Naval Prize Act, 1864—4. Title, when changed—5. Where prizes must be taken—6. Of joint captures generally—7. Constructive captures by public vessels of war—8. When actual sight is not necessary—9. Of joint chase—10. Antecedent and subsequent services—11. Ships associated in same enterprise—12. Mere association not sufficient—13. Convoying ships—14. Vessels detached from fleet—15. Joint captures by land and sea forces—16. By public ships of allies—17. Constructive joint captures not allowed to privateers—18. Revenue cutters under letters of marque—19. Joint captures by boats—20. By tenders—21. By prize masters—22. By non-commissioned vessels—23. Public vessels of war and privateers, &c.—24. Effect of fraud on claims to benefit of joint capture—25. Distribution of prize to joint captors—26. Distribution of head money—27. Collusive captures—28. Forfeiture of claims to prize—29. Probable cause—30. Liability of captors for damages and costs—31. Of owners of privateers—32. Duties and responsibilities of prize masters and prize agents.

Of captures generally

§ 1. WE have discussed, in the preceding chapters, the general rights of war over enemy's property, or property rendered hostile by the acts of its owners, or by the circumstances of its use or disposition; it remains to point out more particularly the rights and duties of its captors. As a general principle, capture is not dependent upon the element on which it happens to be made; nevertheless, usage and the decisions of courts have established rules for maritime capture, very different from those applicable to captures on land; and while the latter have, for a long time, undergone very little change, the former have been moulded into a system of regular practice.[1] This has resulted, in part, from the fact that title to

[1] If the sovereign of the country, to which a ship belongs, or any other sovereign not at war with the former, from motives of necessity arrest a ship either in port or at sea, with a view to restore the ship and goods, or to pay the value to the owner, this is not prize, but is 'an arrest or detention of princes.' The arresting or taking ships for the purpose of *prize* is 'capture.' If a neutral ship be arrested at sea, and carried into a port, under pretence that she belongs to an enemy, this is capture, because it is done as an act of hostility.

booty vests almost immediately on possession, while that to prize is acquired, as a general rule, only after condemnation by a competent court. Another cause of this result is the very small value of booty taken in modern wars, as compared with the rich prizes captured on the ocean. Moreover, matters connected with military operations on land have usually been determined by the varying decisions of courts-martial, and of the executive and ministerial departments of government; while those springing from maritime captures have been carefully investigated and decided by judges learned in the law, whose opinions, preserved in printed reports, are discussed by the tribunals of other countries, and commented on by the text-writers of different ages. We propose here to treat only of maritime captures, leaving the subjects of military occupation and conquest for another chapter.

What constitutes a maritime character

§ 2. The courts have decided that an act of taking possession is not indispensably necessary to a capture; an obedience to the summons of the hostile force, though none of that force be actually on board, is sufficient. The real surrender (*deditio*) of a vessel is dated from the time of striking her colours. But there must be a manifest intention *to retain* as prize, as well as an intention *to seize*, otherwise the capture will be regarded as abandoned. It is therefore generally necessary for the officer who seizes a prize to commit her to the care of a competent prize master *and crew*, because of a want of a right to subject the captured crew to the authority of the captor's officer. But the capture is not abandoned, though only a prize master is put on board, if the captured crew be subjects of the same government as the captor. It has been shown that, as a general rule, all property belonging to the enemy, found afloat upon the high seas, and all property so afloat, belonging to subjects, neutrals, or allies, who conduct themselves as belligerents, may be lawfully captured. All property condemned is, by fiction, or rather by intendment, of law, the property of enemies—that is, of persons to be considered in the particular transaction. Hence, prize acts and laws of capture, with reference to enemy's property, are construed to include that of subjects, neutrals, and allies, who, in the particular transaction, are to be regarded as enemies. It has also been shown that a belligerent can exercise no rights of war within the territorial jurisdiction of a neutral State, and that

this jurisdiction extends, not only within ports, headlands, bays, and the mouths of rivers, but to a distance of three miles from the shore itself. All captures, therefore, made by belligerents, within these limits, are, in themselves, invalid. But this invalidity can be set up only by the government of the neutral State, for, as to it only, is the capture to be considered void; as between enemies, it is deemed, to all intents and purposes, rightful. With respect to the enemy, no right is thereby violated; but with respect to the neutral, an offence has been commited, and he may restore the prize if in his power, or otherwise demand satisfaction. But if he omits or declines to interpose any claim, it is condemnable, *jure belli*, to the captors. Captures, as already shown, may be made not only by public ships of war and vessels commissioned as privateers, but also by non-commissioned vessels, boats, tenders, &c. This general right to make captures results from the law of war, which places all the inhabitants of one belligerent State in the position of public enemies toward all the inhabitants of the other belligerent State. There, however, is a marked distinction between the rights of the captured property, acquired by public and commissioned vessels, and by those acting without any commission or authority.[1] To enable a vessel to make captures which shall enure to the benefit of the captors, it is necessary that she should have a commission; but non-commissioned vessels of a belligerent nation may not only make captures in their own defence, but may, at all times, capture hostile ships and cargoes, without being deemed by the law of nations to be pirates, though they can have no interest in the prizes so captured. Every capture, whether made by commissioned or non-commissioned ships, is at the peril of the captors. If they capture property without reasonable or justifiable cause, they are liable to a suit for restitution, and may also be mulcted in costs and damages. If the vessel and cargo, or any part thereof, be good prize, they are completely justified. And although the whole property may, upon a hearing, be restored, yet, if there was possible cause of capture, they are not responsible in damages.

[1] Phillimore, *On Int. Law*, vol. iii. §§ 345, 349; Pistoye et Duverdy, *Traité des Prises*, tit. ii. 4; Dalloz, *Répertoire*, verb. 'Prise Maritime,' sec. ii. art. 3; Merlin, *Répertoire*, verb. 'Prise Maritime,' §§ 2, 4; the 'Julia,' 8 *Cranch. R.*, 189; the 'Esperanza,' 1 *Hagg. R.*, 91; the 'Hercules,' 2 *Dod. R.*, 63; the 'Resolution,' 6 *Rob.*, 386.

§ 3. The right to all captures vests primarily in the sovereign. By the Naval Prize Act, 1864, 27 and 28 Vict., cap. 25, 'nothing in this Act shall give to the officers and crew of any of her Majesty's ships of war any right or claim in or to any ship or goods taken as prize, or the proceeds thereof, it being the intent of this Act that such officers and crews shall continue to take only such interest (if any) in the proceeds of prizes[1] as may be from time to time granted to them by the Crown.' By s. 29 of the same Act any ship or goods taken as prize by any of the officers and crew of a ship other than a ship of war shall, on condemnation, belong to her Majesty in her office of Admiralty.[2] When the capture enures to the benefit of individuals, it is in consequence of a grant by the State. The distribution of the proceeds of prizes, as has already been stated, must therefore depend upon the regulations of each State. Some are much more liberal in this respect than others. It has been held by the British prize courts that the power of the Crown to direct, before adjudication, the release of captured property, is not taken away by any grant of prize in a prize act, the preservation of such a power in the Crown being necessary in its relations with foreign States. The laws regulating the distribution

The Naval Prize Act, 1864

[1] By royal proclamation of May 16, 1871, ships or vessels being in sight of a prize, as also of the captor, under circumstances to cause intimidation to the prize and encouragement to the captor, shall be alone entitled to share as joint captors. This proclamation provides for the distribution of all net proceeds of prizes, rewards, allowances, salvage awards, and of all bounties and grants whatsoever distributable to the royal navy in the manner of prize money. Under the repealed prize proclamations a captain of marines who happened to be on board a man-of-war when she took a prize, but who did not belong to her complement, only shared as a passenger. (Wemys *v.* Linzee, 1 *Dougl.*, 324.) A captain of a ship being on board at the time that his ship took a prize was entitled to prize money, even though he was in arrest, and another officer had been sent on board to command. (Lumley *v.* Sutton, 8 *T. R.*, 224.)

[2] The original right of the Crown to the entire disposal of all maritime prize requires a brief explanation with reference to the office of Lord High Admiral. This office, when not held by a subject, reverts to the Sovereign, but in a capacity distinct from the regal character, and thus continues to have an uninterrupted legal existence. For the maintenance of this high office, when conferred upon a subject, an ancient royal grant was made of certain kinds of maritime prize, which became wholly divested from the Crown and permanently attached as perquisites to the office of Lord High Admiral. These perquisites are called *droits* of the Admiralty; and the ancient grant is recognised by an Order of Council of King Charles II. (1665–6). See *Hay and Marriott's Reports*, 50; 2 and 3 Will. and Mary, c. 2; 7 and 8 Geo. IV., c. 65.

of the proceeds of captures apply only *after* condemnation.[1]

Title, when changed

§ 4. On the completion of the capture, the title to the captured property vests in the captor, or rather in his Sovereign; and, as a general rule, capture is deemed complete when the surrender has taken place, and the *spes recuperandi* is gone. With respect to *booty*, it is universally conceded that twenty-four hours' possession completes the title of the captor, and the same rule formerly prevailed with respect to *maritime* captures; but modern usage, after much fluctuation, is likely to settle upon the principle, that the captor acquires an inchoate title by possession alone, and that, to make this complete and perfect, a condemnation by a competent court of prize is necessary.[2] By the ancient law of Europe, the *perductio infra præsidia, infra locum tutum*, was considered necessary for the conversion of the property captured; but much difficulty arose as to what constituted a *perductio infra præsidia*. By a later usage a possession of twenty-four hours was sufficient to divest the title of the former owner. This, according to the commentaries of Grotius and Barbeyrac, is the meaning of the 287th article of the *Consolato del Mare*. Bynkershoek and Grotius express themselves to the same effect, and Loccenius considered this rule as the general law of Europe. Lord Stair decided this to be the rule of law in Scotland, and, according to Valin, a similar practice prevailed in France. It was also the ancient law of England, that the former owner was divested of his property, unless it was reclaimed *ante occasum solis*. But the Ordinance of 1649 directed a restitution upon salvage to British subjects, although the Common Law still prevailed where the enemy had fitted out the prize as a vessel of war. As England became more commercial, it became her settled policy to regard the property of a captured vessel as not changed, without a regular sentence of condemnation, pro-

[1] De Cussy, *Droit Maritime*, liv. i. tit. iii. § 26; the 'Elsebe,' 5 *Rob.*, 173; the 'Gertruyda,' 2 *Rob.*, 211; the 'Eutrusco,' 4 *Rob.*, 262; Ships taken at Genoa, 4 *Rob.*, 388; the 'Thorshaven,' *Edw. R.*, 102; Thurgar *v.* Morley, 3 *Merivale R.*, 20.

A captor of a prize may legally assign his share therein, before condemnation. (Morrough *v.* Comyns, 1 *Wils.*, 211.)

[2] It is a principle of the prize procedure of the United States, that belligerent captors are discharged of liens, or equities, of neutral creditors, resting upon the effects of an enemy seized at sea. (The 'Sally Magee,' Blatchf., *Pr. Cas.*, 382.)

nounced by a court of competent jurisdiction, and the title, from the time of capture, till such condemnation, as in abeyance, and not capable of being transferred. This principle is not only recognised by her prize courts, but is now firmly incorporated into her Common Law.

The rule, however, is not inflexible, and necessity requires that occassional exceptions should be made to it; this was done in the case of the 'Felicity,' an American prize, taken by H.M.S. 'Endymion' in 1814, and destroyed by that cruiser,[1] the reason of this being that the captain of the 'Endymion' could not send his prize to any British port for adjudication, without reducing his own force, the reduction of which would have sacrificed an immediate and important service on which he was detached. The above rule is adopted by the courts and incorporated into the statutes of the United States. But, as most of the Continental States of Europe adhere, in a measure, to their ancient practice, both Great Britian and the United States adopt toward them, in case of recaptures, the rule of reciprocity, giving to them the same measure of justice which they mete out to others. But this question belongs more properly to another branch of the subject, and will be discussed in chapter xxxv., on the rights of postliminy and recapture.[2]

Where prizes must be taken

§ 5. It is incumbent on the captor to bring his prize, as speedily as may be consistent with his other duties, within the jurisdiction of a court competent to adjudicate upon it.[3]

[1] 2 *Dods. R.*, 381; see also the 'Leucade,' *Spinks*, 220.

[2] Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. §§ 11, 12; Phillimore, *On Int. Law*, vol. iii., §§ 407 et seq.; Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. vi. § 3; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. v.; Loccenius, *Jus Maritimum*, ii. iv. vi. §§ 4, 8; Goss et al. *v.* Withers, 2 *Burr. R.*, 693; the 'Ceylon,' 1 *Dod. R.*, 105; 'L'Actif,' *Edw. R.*, 185; Assievedo *v.* Cambridge, 10 *Mod. R.*, 77; Brymer *v.* Atkins, 1 *H. Black. R.*, 189; the 'Flodoyen,' 1 *Rob.*, 117; the 'Estrella, 4 *Wheat. R.*, 298.

[3] Bello, *Derecho Internacional*, pt. ii. cap. v. § 5; the 'Peacock,' 4 *Rob.*, 192; Jecker et al. *v.* Montgomery, 13 *Howard R.*, 516; the 'Principe,' *Edw. R.*, 70; the 'Wilhelmina,' 5 *Rob.*, 143; the 'Washington,' 6 *Rob.*, 275; the 'Madonna del Burso,' 4 *Rob.*, 169; the 'Corrier Maritimo,' 1 *Rob.*, 287.

In the United States the duties of captors of prize are prescribed, by the Act of June 30, 1864, s. 1, 13 *Stat. at L.*, 306.

Rules of United States Navy as to prize

The following were among the regulations issued by the Navy Department of the United States, August 7, 1876, for the government of all persons attached to that service:—

CH. XX.—'2. When a vessel is seized as a prize, it shall be the duty of the commanding officer of the vessel making the capture to cause all the hatches and passages leading to the cargo to be secured and sealed, except such as it may be indispensably necessary to keep open. The log-book, and all papers relating to the vessel and cargo, shall also be

But, as before stated, if prevented by imperious circumstances from bringing it in, he may be excused for taking it to a

sealed up, and placed in charge of the prize-master, for delivery with the vessel and cargo.

'3. Should it be necessary to take out of a vessel, seized as a prize, any property, either for its better preservation or for the use of the vessels or armed forces of the United States, a correct inventory, and a careful appraisement of its value, by suitable officers qualified to judge, shall be made. This inventory and appraisement to be made in duplicate, one of which is to be transmitted to the Secretary of the Navy and the other to the judge or the United States attorney of the district to which the prize may be sent.

'4. If it should become necessary to sell any portion of captured property, a full report of the facts must be made to the United States attorney or judge of the district court to which the prize is sent, and any proceeds of sale shall be held subject to the order of the said judge.

'5. The prize-master will vigilantly guard the property entrusted to his care from spoliation and theft, these offences leading to a forfeiture of prize money, and such other punishment as a prize court may inflict, both of the crew and the prize-master.

'6. The commanding officer of any vessel making a capture shall report to the Navy Department, and to the judge of the court to which the prize is sent, all the material facts, including the names of all vessels within signal distance at the time, with all the circumstances of their position.

'7. The commanding officers of all vessels claiming to share in a prize will cause the prize list to exhibit not only the name and rank or rating, but also the rate of the annual or monthly pay of each person borne on the books at the time of the capture to which the list refers. They will also forward a statement of their claims, with the grounds upon which they are based, to the Navy Department, and to the judge of the district court to which the prize is sent.

'8. The master of the captured or seized vessel, and as many of the officers and crew as can properly be taken care of, shall be sent in custody of the prize-master, who will report immediately on his arrival to the United States attorney, as well as to the Navy Department. The mate and supercargo, after the master, are the most important witnesses before a prize court, and should always be sent with the vessel, or carried into the port to which she may be sent for adjudication, without delay.

'9. In time of war the commanding officer of a vessel is to exercise constant vigilance to prevent supplies of arms, munitions, and contraband articles being conveyed to the enemy, yet under no circumstances is he to seize any vessel within the waters of a friendly nation.

'10. A commanding officer in time of war is to exercise the right of visitation and search on all suspected vessels other than neutral men-of-war, but in no case is he authorised to fire at a vessel without showing colours and giving her notice of a desire to speak and to visit her; first, a blank cartridge is to be fired; second, a shot fired wide of her; third, a shot fired at the vessel; nor is he to fire at any such vessel or commit an act of hostility or of authority within a marine league of any foreign country with which the United States is at peace.

'11. When a visit is made, a vessel, if neutral, is not to be seized without a search renders it reasonable to believe that she is engaged in carrying contraband of war for or to the enemy, and to his ports, directly or indirectly, or unless she is attempting to violate a blockade established by the United States. If, after any visitation and search, it shall appear that the vessel is, in good faith and without contraband, actually bound and passing from one neutral port to another, and not bound or pro-

foreign port, or for selling it, provided he afterwards reasonably subjects its proceeds to the jurisdiction of a competent

ceeding to or from a port in the possession of the enemy, then she cannot be lawfully seized. It is the duty of the officer making the search to endorse upon the ship's register or license the fact of the visit, the nature of the search, by what vessel made, the name of her commanding officer, the latitude and longitude, the time of detention, and when released.

'12. In order to avoid difficulty and error in relation to papers found on board a neutral vessel that may have been seized, the commanding officer will take care that official seals, or fastenings of foreign authorities, are in no case broken, and that parcels covered by them are never read by any naval authorities; but that all bags or other covering of such parcels are remitted to the prize court.

'13. The officers and crew of a neutral vessel seized are not to be confined except by detention on board, unless by their own conduct they should render further restraint necessary. Their personal property is to be respected, and a full and proper allowance of provisions is to be distributed to them. If any cruelty or unnecessary force is used towards such crew, a prize court will decree damages to the injured parties.

'14. A neutral vessel seized is to wear the flag of her own country until she is adjudged to be a lawful prize by a competent court. The flag of the United States, however, may be exhibited at the fore, to indicate that she is, for the time, in the possession of officers of the United States.

'15. The form of a letter of instructions to be given to prize masters is as follows:—

'"United States S———

'"Off———.

'"Sir,—You will take charge of the ———, captured on the ——— day of ———, 18—, by ———, and proceed with the said prize to the port of ———, and there deliver her with the accompanying papers (which were all that were found on board), and the persons sent as witnesses, to the judge of the United States district court, or to the United States prize commissioners at that place, taking his or their receipt for the same. You will not deliver either the vessel, the papers, or the witnesses to the order of any other person or parties unless directed to act otherwise by the Navy Department or flag officer commanding the squadron to which you are attached.

'"On your arrival at ——— you will immediately report in person to the commanding or senior navy officer of the navy yard or station thereat, and show him these instructions; and you will report also, by letter, to the Secretary of the Navy, stating in full the particulars of your passage home, and transmit to him, through the commandant or senior officer, the names of the officers and men composing your prize crew, and any communications for the Department with which you may be charged. You will on your arrival allow no person to leave the vessel without permission from the commandant of the station, nor go on shore yourself except on your necessary duty. You will not sleep out of the vessel while in charge, nor allow any but official boats to approach and only official persons on duty to come on board. You will without delay after reporting call upon the United States attorney at ———, show him these instructions which are issued by order of the Secretary of the Navy, and give him all the information in your power respecting the circumstances connected with the capture of the ———. You will then report and show these instructions to the naval prize commissioner of the district, who is hereby directed to ascertain and notify you of the earliest date at which your attendance shall no longer be required by the court,

court of prize. The court within whose jurisdiction the proceeds of the sale are brought takes cognisance of the case,

and to endorse the notification on this paper. You will on being discharged from attendance, if not in the meantime instructed, and whenever you need instructions respecting yourself, officers, or prize crew, immediately report to the commandant of the nearest yard or station or senior officer for such instructions. You will particularly bear in mind and strictly observe the injunctions of the law and of the department respecting captured property or persons under your charge, and recollect that you will be held rigorously responsible for any mismanagement of the trust confided to you. You, your officers, and prize crew are hereby detached from the ————, and you will be careful to apply for and take with you their pay accounts and your own, to be presented to the paymaster of the yard or station at or nearest to the port to which you are ordered. The sea pay of yourself and officers will continue while in charge of the prize or under the orders of a flag officer or senior navy officer afloat, but your name will not be borne on the books of the vessel from which you are detached, and you will not be entitled to share in prizes made by such vessel after your detachment.

'"(Signed) ————,

'"To ———— Commanding the United States ————."

'16. The prize master in whose charge instruments are placed, or to whom arms are entrusted, will be held strictly accountable for their condition, and in case of loss or damage by neglect, or other cause not satisfactorily explained, the value will be charged to his account. The officer appointing a prize master will require him to give a receipt in duplicate for the instruments and arms with which he may be furnished, one to be forwarded to the commanding officer of the station to which the prize vessel is bound, and the other to be retained by such appointing officer; and in case of any deficiency in the delivery of, or palpable abuse of them, the commanding officer of the station will at once have the matter investigated, and report the result to the Navy Department.

'17. Prisoners of war are to be treated with humanity; their personal property is to be carefully protected; they shall have a proper allowance of provisions, and every comfort of air and exercise which circumstances will permit of. Every precaution must be taken to prevent any hostile attempt on their part, and, if necessary or expedient, they may be ironed or closely confined. If officers give their parole not to attempt any hostile act on board the vessel, and to conform to such requirements as the commanding officer may consider necessary, they may be permitted any privileges he may deem proper.

'18. If any vessel shall be taken acting as a vessel of war, or a privateer, without having a proper commission so to act, the officers and crew shall be considered as pirates, and treated accordingly.'

By the Queen's Regulations and Admiralty Instructions of 1879 it is ordered:—

'1919. When any ship or vessel shall be captured or detained, her hatches are to be securely fastened and sealed, and her lading and furniture, and, in general, everything on board, are to be carefully secured from embezzlement; the officer placed in charge of her shall prevent anything from being taken out of her until she shall have been tried, and sentence shall have been passed on her in a Court of Admiralty or of Vice-Admiralty.

'1920. The captain of the capturing or detaining ship shall cause the principal officers of the vessel detained, and such other persons of the crew as he shall think fit, to be examined as witnesses, in the Court of

and adjudicates not only upon the validity of the original capture, but also upon the disposition which has been made of the captured property. This subject will be more particularly considered in chap. xxxii.

Of joint captures generally

§ 6. *Joint captures* are those made by two or more vessels acting in conjunction, or by one or more vessels with the co-operation of land forces. Where all captured property is condemned to the government, it is of very little importance who are to be considered the real captors where several lay claim to that title; but where captured property is condemned as prize to the benefit of the captors, it becomes a question of special interest to determine who are, in law, to be considered as captors, and, consequently, to share in the prize. As a general rule, all the parties who are actually engaged in the seizure, or who directly contribute to the surrender, are properly to be considered as joint captors, and, consequently, share in the prize, but the actual amount of assistance necessary to constitute joint capture, under the different circumstances of chase and surrender, as determined by the decisions of courts of prize, depends in a great measure upon the character of the vessels and their position at the time of actual seizure.

Constructive captures by public vessels

§ 7. We will first consider joint capture *by public vessels of war*. All ships of war which are *in sight* at the time of the actual seizure are deemed to be constructively assisting, and, therefore, are entitled to share in the prize. The reason of this rule is, that public ships are under a constant obligation to attack the enemy wherever seen, and, therefore, from the mere circumstance of being in sight, a presumption is sufficiently raised that they are there *animo capiendi*; and this rule is

Admiralty or of Vice-Admiralty, to prove to whom the vessel and cargo belong; and he shall send to the said Court all passports, custom-house clearances, log books, and all other ship's papers which shall be found on board, without suffering any of them to be on any pretence secreted or withheld.

'1921. The captain and the prize master are to take particular care that all prisoners of war are treated with humanity; that their personal property is carefully protected; that they have their proper allowance of provisions, viz. two-thirds of all species, except spirits, wine, or beer, of which none shall ever be issued to them; and that every comfort of air and exercise, which circumstances admit of, be allowed them; but, to prevent any hostile attempts on their part, they are to be always attentively watched and guarded, especially when many of the ship's company may happen to be employed aloft.'

additionally supported by the obvious policy of promoting harmony in the naval service. But the vessel claiming such *constructive* assistance must be actually in sight at the time of capture, or at least at the commencement of the engagement or chase, for there must be some actual contribution of endeavour as well as of general intention. If the circumstances of the case repel the presumption of the *animus capiendi*, as where the public ship is steering an opposite or a different course, inconsistent with the notion of an intent to capture, the claim to joint capture cannot be sustained. But the mere sailing on a different course is not sufficient to defeat this claim; for it is not always necessary that two vessels should pursue the same line, where, acting with a unity of purpose, the same object is sometimes better accomplished by one vessel sailing in one direction, and another in a different direction. But if the ship claiming as joint captor has changed her course before the actual capture, in such a manner as to show that she had abandoned all design of continuing the pursuit, the claim is defeated. So, also, if the prize has been merely reconnoitred, without any attempt at pursuit. It is very doubtful whether merely seeing the prize from the masthead, however clearly the *animus capiendi* may be proved, will bring the case within the rule of being *in sight*. In all cases of constructive joint capture, the *onus probandi* rests upon the party claiming the benefit of the rule. Nor is it sufficient to prove that the joint captor was in sight of the actual captor; it is also necessary that she was seen by the prize. Both these facts must be established; the one by direct evidence, and the other by implication and necessary inference. Being in sight means being seen by the prize, as well as by the actual captor, and thereby causing intimidation to the enemy, and encouragement to the friend. One of these will not do without the other.[1]

[1] The 'Drie Gebroeders,' 5 *Rob.*, 339; the 'Jan Frederick,' 5 *Rob.*, 120; the 'Robert,' 3 *Rob.*, 194; the 'Lord Middleton,' 4 *Rob.*, 153; the 'Spankler,' 1 *Dod. R.*, 359; the 'Rattlesnake,' 2 *Dod. R.*, 35.

As to what constitutes 'signal distance' within the meaning of the Act, regulating the distribution of prize money, *see* the 'Aries,' 2 *Sprague*, 262; the 'St. John,' *ibid.* 266; the 'Ella and Anna,' *ibid.* 267; the 'Ella,' 2 *Int. R. R.*, 117.

The single fact, that a vessel is one of a common force, does not entitle her to participate in the prize shares, obtained by the separate members of the force. It must be shown, that such vessel was 'in sight,' or 'within signal distance' of the occurrence, out of which the taking of

§ 8. But actual sight is not absolutely necessary to constitute constructive joint capture. If it be shown that the asserted joint captor was in sight when the darkness came on, and that she continued steering in the same course by which she was before nearing the prize, and that the prize itself also continued the same course, it amounts almost to a demonstration that the vessels would have seen, and been seen by each other at the time of capture, if darkness had not intervened. In such a case, the vessel so pursuing is let into the benefit of joint capture. But, if the seizure is made at such a distance from the asserted joint captor that she could not have been in sight if it had been day, the claim cannot be sustained.[1] **When actual sight is not necessary**

§ 9. In respect to *joint chase*, much depends upon whether the vessels are acting in association, or separately with a common object in view. In the latter case, the question of actual or constructive sight will generally determine the claim to joint capture, as stated in the preceding paragraph. If the claimant, or the prize, changed her course in the night, and, at the time of actual capture, could not have been seen by each other in daylight, the mere fact that the chase had the effect of throwing the prize into the hands of the actual taker will not vary the case. Constructive captures are never allowed to be deduced from such assistance, whether designed or accidental.[2] **Of joint chase**

§ 10. No *antecedent* or *subsequent* services in the expedition will entitle a party to the benefit of joint capture, where he would not otherwise be entitled to share. Thus, a ship of war sent for reinforcements to Lord William Bentinck, on hearing the firing of the fleet upon Genoa, returned from Leghorn, and was in sight at the time of the capitulation; but, as the ship was ignorant of the object of the attack, and the captors were **Services before and after capture**

the prize was realised. She must have been so situated, as to be able, of her own accord, to contribute direct assistance to the captors, by deterring the enemy from resistance, or by aiding physically in overcoming such resistance, and the vessel to be aided must have possessed the means of communicating intelligent directions to the one whose aid was needed. The Acts of Congress, on the subject of distribution of prize money, contemplate that it shall be shared among vessels, which, at the time of the capture, were in view of each other, so as to be able to receive and respond to signals correctly. A vessel, claiming to share in the proceeds of a capture, must show that she was within signal distance of the vessel making the prize, in circumstances which might have justified the capturing vessel in demanding and expecting her assistance. (The 'Anglia,' *Blatchf. Pr. Cas.*, 566.)

[1] The 'Union,' 1 *Dod. R.*, 346; the 'Financier,' 1 *Dod. R.*, 61.

[2] The 'Neimen,' 1 *Dod. R.*, 9; the 'Mélanie,' 2 *Dod. R.*, 122.

ignorant of her approach, she was not allowed to come in as a joint captor. So, of a ship of war which was despatched to join the contingent expedition against Buenos Ayres, but did not arrive till after the surrender.[1]

Vessels associated in same service

§ 11. In respect to captures made by ships which are associated in the same service or joint enterprise, under the same superior officer, as a general rule all are entitled to share as joint captors, although not in sight at the time of capture. The fleet so associated is considered as one body, acting together for one single object, and what is done by a part enures to the benefit of all. The only question to be considered is, whether the capturing ships at the time the capture was made composed, *de facto*, a part of the particular fleet. Thus, where a capture was made by ships composing part of a squadron employed in the blockade of the Texel, out of sight of the fleet and without any concurrence in chasing, the court held that the blockading fleet were all joint captors. So, where a prize coming out of or entering a blockaded port is taken by one of the ships of a blockading squadron stationed off the mouth of the harbour, while the rest of the squadron, maintaining the blockade, are stationed at some distance. In the case of the 'Guillaume Tell,' a squadron was stationed to watch the harbour of La Vallette. The prize, in attempting to escape, was pursued and taken by a part of the squadron, while the others remained stationary. The claim to joint capture was allowed, notwithstanding the physical impossibility of active co-operation, arising from the state of the wind.[2]

Mere association not sufficient

§ 12. But mere association is not sufficient to entitle vessels to share as constructive joint captors; they must have a military character, and be capable of rendering military service;

[1] The 'Buenos Ayres,' 1 *Dod. R.*, 28; 'Genoa and Lavona,' 2 *Dod. R.*, 88.

[2] The 'Harmonie,' 3 *Rob.*, 318; the 'Henriette,' 2 *Dod. R.*, 96; the 'Guillaume Tell,' *Edw. R.*, 6; the 'Empress,' 1 *Dod. R.*, 368.

But where a capture was made of a blockade-runner, between the several vessels forming the blockading squadron, but the capture took place after a chase, which carried the runner and the capturing vessel out of sight of the other members of the squadron—Held, that the latter vessels were not entitled to share in the proceeds of the prize, which is confined by the laws of the United States to two classes of vessels, those making the capture, and those within signal distance of the vessel making the capture. (The 'Cherokee,' 2 *Sprague*, 235.)

Vessels and cargoes seized for violation of the laws of blockade, or as enemy's property, are prizes of war under the law of nations, and not under municipal authority. (The 'Nassau,' *Blatchf. Pr. Cas.*, 665.)

in other words, there must be an *animus capiendi*. Thus, a ship forming part of a blockading squadron, but totally unrigged, and incapable of rendering any service at the time of capture, is held to be as much excluded as one totally unconscious of the transaction; because by no possibility could that ship be enabled to co-operate in time. So of transports and store ships, although associated in the same service with the actual captor, if destitute of a military character, and incapable of rendering assistance, they cannot be regarded as joint captors. It is not sufficient that the enemy may have been intimidated by the presence of such vessels. Mere intimidation may be produced without any co-operation having been given or intended. If a frigate were going to attack an enemy's vessel, and four or five large merchant ships, unconscious of the transaction, should appear in sight, they might be objects of terror to the enemy, but such terror would not entitle them to share in the prize as joint captors.[1]

Convoying ships

§ 13. Convoying ships are under no disability of claiming as joint captors an account of their employment, if, in other respects, entitled to share in the prize, unless the capture is made at such a distance as would remove them from the performance of the special duty of protecting their convoy. Being military ships and capable of rendering assistance (where not interfering with this special duty), they are entitled to all the benefits of constructive capture, whether the construction arises from association, sight, or otherwise. But if the convoying ship desert her duty, she forfeits all benefit of capture.[2]

Detached vessels

§ 14. If a vessel be detached from the fleet at the time of capture, so as to separate her from the joint object, she cannot be considered as a constituent part or member of the association, and cannot claim the benefit of joint capture with the fleet, nor can the fleet be allowed to come in as joint captors in any prize taken by her after she was detached. Thus, where two vessels of a blockading squadron were sent to look out for an enemy's ship and captured her, the rest, which maintained their station, were held not entitled to share. So, where two vessels were detached, one by stress of weather and another in chase, they were held not entitled to share in a

[1] The 'Cape of Good Hope,' 2 *Rob.*, 274; the 'Twee Gesuster' and 'Le Franc,' 2 *Rob.*, 284, note.

[2] The 'Waaksamheid,' 3 *Rob.*, 1; the 'Fury,' 3 *Rob.*, 9.

capture made in their absence. But where two vessels were sent to chase and the rest of the fleet were bearing up to support them, the claim of the latter to joint capture was allowed. And a ship, forming a part of a blockading squadron and continuing as such, although temporarily detached at the time of the summons, and not returning till after the capitulation of the place so blockaded, was, nevertheless, entitled to share as joint captor with the rest of the blockading force. So, a ship in joint chase of one vessel, being ordered by a superior to chase another, the two chasing vessels are regarded as associated for the joint object of capturing both of those chased, and, although only one is captured, they jointly share in the prize. But if neither received nor was actually under the orders of the other, or of a common superior, the case would be different.[1]

Joint captures by land and sea forces

§ 15. When land and sea forces act in conjunction, and no express provision is made by statute for the distribution of prizes taken by their joint operation, resort must be had to the principles established by judicial decisions. It has been held that a mere general co-operation, in the same general objects, will not be sufficient to make land forces joint captors with a fleet; there must be an actual assistance and co-operation in the particular capture. Where there is pre-concert, a very slight service is sufficient. So, where soldiers are landed on the coast, to co-operate with a fleet, in a conjunct expedition, or in a particular engagement, they are entitled to share in the capture. In the case of a claim on the part of the army to share in a capture made by the fleet, the *onus probandi* lies upon them to show that there was an actual co-operation on their part, assisting to produce the surrender. Without a pre-concert, or conjunct expedition, they are not entitled to the benefit of constructive capture; therefore, to establish a claim of joint capture between them, there must be a contribution of actual assistance, and the mere presence, or being in sight, will not be sufficient. Between public ships of war, there is always conceived to be a privity of purpose, which constitutes a community of interest; and this community of interest extends to public ships of different countries, if allies; but between land and sea forces, acting independently of each other, no

[1] The 'Forsigheid,' 3 *Rob.*, 311; the 'Island of Trinidad,' 5 *Rob.*, 92; the 'L'Etoile,' 7 *Dod. R.*, 106; the 'Naples Grant,' 2 *Dod. R.*, 273; the 'Nordstern,' cited, *Edw. R.*, 126; the 'Cherokee,' *ante*, p. 374.

such privity can be presumed. Hence, the difference of the rules applicable to the two cases.[1]

By public ships of allies

§ 16. The public ships of allies, serving together, are entitled to share in captures, the same as those of a single belligerent. There is no difference in this respect, whether the benefit of joint capture goes to the government or to the vessels, their commanders and crews. If, of two allied joint captors, the government of one has made a grant of the prize, and the other has not, the condemnation will be, in the former case, directly to the joint captor, and in the latter to the government, according to the share of each. A question may, however, arise, in case of joint capture by allies, with respect to the court which shall be entitled to adjudicate upon the capture.[2]

Constructive joint captures not allowed to privateers

§ 17. It has already been stated that, as public ships of war are under a constant obligation to attack the enemy wherever seen, and as a neglect of this duty is not to be presumed, there is a privity of purpose, which constitutes a community of interest, and the mere circumstance of being in sight, is sufficient to entitle such a vessel to the benefit of joint capture. But as the same obligation does not rest upon privateers, the law does

[1] The 'Stella del Norte,' 5 *Rob.*, 349; the 'Dordrecht,' 2 *Rob.*, 55.

By 27 and 28 Vict., cap. 25, s. 34, it is enacted that where, in an expedition of any of her Majesty's naval or naval and military forces, against a fortress or possession on land, goods belonging to the State of the enemy or to a public trading company of the enemy, exercising powers of government, are taken in the fortress or possession, or a ship is taken in waters defended by or belonging to the fortress or possession, a prize court shall have jurisdiction as to the goods or ships so taken, and any goods taken on board the ship, as in case of prize.

[2] Phillimore, *On Int. Law*, vol. iii. §§ 390–401; Ortolan, *Diplomatie de la Mer*, tome ii., appen. spécial. An ally actually co-operating in effecting a capture cannot sue in the common law courts, but must sue in the prize court. (Duckworth *v.* Tucker, 2 *Taunt.*, 7.)

By 27 and 28 Vict., c. 25, s. 35, 'where any ship or goods is or are taken by any of her Majesty's naval, or naval and military, forces, while acting in conjunction with any forces of any of her Majesty's allies, a prize court shall have jurisdiction as to the same, as in case of prize, and shall have power, after condemnation, to apportion the due share of the proceeds to her Majesty's ally, the proportionate amount and the disposition of which share shall be such as may from time to time be agreed between her Majesty and her Majesty's ally.' By the convention of May 20, 1854, entered into between France and England, it was stipulated (art. 2), that when a joint capture shall be made by the naval forces of the two countries, the adjudication shall belong to the jurisdiction of the country whose flag shall have been borne by the officer having the superior command in the action; and (art. 3) that when a capture shall have been made by a cruiser of either of the two allied nations, in the presence and in the sight of a cruiser of the other, such cruiser contributing to the capture, the adjudication of the case shall belong to the jurisdiction of the country of the actual captor.

not give them the benefit of the same presumption of an *animus capiendi*. They generally clothe themselves with commissions of war for private advantage only; and, however allowable this may be when combined with other considerations of public policy, it will not lead to the same inference, as in the case of public ships of war. Hence, the *animus capiendi* of a privateer must be demonstrated by some overt act, by some variation of conduct, which would not have taken place, but with reference to that particular object, and if the intention of acting against the enemy had not been entertained. A different rule would induce privateers to follow in the wake of public ships of war, and keeping in sight of them, merely to become entitled to the joint benefits of the captures which they might make. But a public ship of war is entitled to the benefit of constructive joint capture, where the actual taker is a privateer, the same as though both were vessels of war. The reason of this rule is obvious.[1]

Captures by revenue cutters

§ 18. Revenue cutters are sometimes furnished with letters of marque and cruise, beyond the ordinary limits of their duty as coast-guards, for the purpose of capturing enemy's merchant vessels. They are public vessels, but not public vessels of war, and, with respect to the benefits of joint capture, are, by English courts, considered in the light of privateers, and the rule of constructive assistance, from being in sight, does not apply to them; for, not being under the same obligations as king's ships to attack the enemy, they are not entitled to the same presumption in their favour.[2]

By boats

§ 19. With respect to captures made by *boats*, it is a general rule, that the ships to which they belong are entitled to share as joint captors; or rather, the capture is considered as made

[1] The 'L'Amitié,' 6 *Rob.*, 261; the 'Santa Brigada,' 3 *Rob.*, 52; Talbot *v.* 'Three Briggs,' 1 *Dallas R.*, 95; 'La Flore,' 5 *Rob.*, 238; the 'Galen,' 2 *Dod. R.*, 19.

See, as to privateers, ch. xxii. § 25.

[2] Phillimore, *On Int. Law*, vol. iii., § 395; the 'Bellona,' *Edw. R.*, 63.

When it appeared that the prize property was captured by a United States steam transport ship, no other vessel co-operating therein or being within signal distance at the time, and that the prize vessel was of inferior force, the court, to carry into effect the Act of June 30, 1864, allowing vessels not of the navy to share in a prize in certain cases, referred it to a commissioner to report the names and employments of the captors on board the transport ship present, and engaged in the capture, and the relative compensation properly allowable to them severally. (The 'Emma,' *Blatchf. Pr. Cas.*, 607.)

by the ship, the boats being a part of the force of the ship. But if the capturing boat has been detached from the ship to which it belongs, and attached to another, only the ship to which it is attached at the time of capture shares in the prize. Mere constructive capture by boats, will hardly entitle the ships to which they belong, to be allowed to come in as joint captors, for the fact of boats being in sight, does not necessarily raise the presumption of assistance, by the intimidation of the enemy, and the encouragement of the friend. Thus where the boats of a ship, lying in a harbour, were within sight of a capture, it was held that the ship could not be allowed to share as joint captor.[1]

By tenders

§ 20. Captures made by *tenders* are regulated by the same rules as those made by boats, the ship to which the tender is attached being entitled to share, however distant she may be at the time of capture. But, in order to support the averment that the claimant was the principal, and the capturing vessel a mere tender, it must be shown, either that there had been some express designation of her as of that character, or that there had been a constant employment and occupation in a manner peculiar to tenders, equivalent to an express designation, and sufficient to impress that character upon her.[2]

By prize masters

§ 21. Prizes hold the same relation to their captors, as do the boats of the same vessel. Hence, prize interests acquired by a prize master on board of a captured vessel, enure to the benefit of the whole ship's company. This is the natural and reasonable result of that community of interest existing between the prize master and prize crew, and the capturing vessel, the former being merely temporarily detached to take the prize into port, but without any real separation of object or interest.[3]

By non-commissioned vessels

§ 22. The general rules of joint capture for commissioned privateers, are also applicable to non-commissioned vessels; with this distinction:—that all captures by the latter must be condemned to the government as *droits of Admiralty*, the captors only receiving compensation in the nature of salvage,

[1] The 'Anna Maria,' 3 *Rob.*, 211; the 'Odin,' 4 *Rob.*, 318; the 'Mélomane,' 5 *Rob.*, 41.

[2] Wildman, *Int. Law*, vol. ii. pp. 334, 335; the 'Carl,' *Spinks R.*, 261; the 'Island of Curaçoa,' 5 *Rob.*, 282, note.

[3] The 'Anna Maria,' 3 *Rob.*, 211; the 'Mélomane,' 5 *Rob.*, 41; the 'Belle Coquette,' 1 *Dod. R.*, 18; the 'Nancy,' 4 *Rob.*, 327, note.

which is usually awarded by the prize court, where their conduct has been fair; and, in cases where there has been great personal gallantry and merit, the whole value of the prize is given them. Where a vessel has a commission against one enemy, but none against another whose property is captured, it is regarded as non-commissioned with respect to that particular capture. If, at the time of the capture by a vessel commissioned by a letter of marque, the master of the capturing vessel be not on board, the capture is considered as made without commission, and enures to the government. So of a vessel fitted out and manned by a ship of war, and acting without any authority or commission; unless brought within the definition of a *tender*, it is deemed a non-commissioned vessel, and its captures enure, not to the benefit of the man-of-war, but to the government. But the question whether the capture is made by a duly commissioned captor, or not, is one between the government and the captor, with which claimants have nothing to do; they have no legal standing to assert the right of the State.[1]

§ 23. Where a privateer or a non-commissioned vessel is

[1] The 'Charlotte,' 5 *Rob.*, 280; the 'Dos Hermanos,' 2 *Wheat. R.*, 76; the 'Cape of Good Hope,' 2 *Rob.*, 274.

The profits of a capture made by individuals, acting without a commission, enure to the government, but it has not been the practice to exact them. It has been their practice to recompense gratuitous enterprise, courage, and patriotism, by assigning the captor a part, and sometimes the whole of the prize. (1 *Op. Att.-Gen.*, 463.) Under the Acts of March 25, 1862, and July 17, 1862 (12 *Stat. at L.*, 375, 4; and 607, 6), an armed merchant vessel, not in the service of, and having no commission from, the United States, although she is present at the capture of a prize and co-operates therein, is not entitled to share in the proceeds. (The 'Merrimac,' *Blatchf. Pr. Cas.*, 584.)

The British Court of Admiralty, in 1814, held that the mere employment of a ship in the military service of the enemy was not a sufficient *setting forth for war* to entitle a recaptor to condemnation under the terms of the existing prize act, but that if there was a fair semblance of authority in the person directing a vessel to be so employed, and there was nothing upon the face of the proceedings to invalidate it, the court would presume that he was duly authorised. The commander of a single ship may be vested with this authority as well as the commander of a squadron. (The 'Georgiana,' 1 *Dods.*, 397.) In the case of the 'Castor' (Lords of Appeal, 1795), the authority of the commander of a fleet was considered sufficient. In the case of the 'Ceylon' (1 *Dods.*, 105), it was held that the employment of a ship for purposes of war under the authority of the Governor of the Mauritius was sufficient to constitute it a public ship of war. No particular inconvenience can arise from the practice; the only question is whether the prizes taken should be condemned to the individual captor or to the government, but the decision either way could afford but little consolation to the captured.

Public vessels of war and privateers

the actual captor, and a man-of-war only a joint captor, the latter has no right to dispossess the former, but is entitled to put some one on board to take care of the interests she may have in the capture. It is not essential, but a measure of proper precaution and of great convenience, that an interest should be asserted at the time. Where expenses were incurred by the actual captor in consequence of an omission of this precaution, they were directed to be paid out of the proceeds. Where a man-of-war and a privateer were joint chasers, and the privateer came up first, and struck the first blow, but the man-of-war was the actual taker, they were held to be joint *actual* captors.[1] A man-of-war cannot dispossess a privateer, or a vessel under letters of reprisals, or a non-commissioned ship, which is an actual captor.[2] If a prize be made by two or more privateers, they share proportionally, according to the number of men of which their respective crews consist.[3]

Effect of fraud on claims for joint capture

§ 24. Any misconduct or fraud on the part of the capturing vessel, intended to deceive another, in order to prevent her from taking part in a capture, is generally punished by admitting the claim of the latter to the benefit of joint captor. Thus in the case of the 'Herman Parlo,' the actual captor extinguished his lights in order to prevent other ships from seeing the chase or capture. In the case of the 'Eendraught,' the captor hoisted American colours, and offered to protect the prize against the other vessels who were chasing her; by this means, the actual capture was deferred till the other vessels were out of sight. In both these cases the claims to joint capture were admitted, although the claimants were not in sight when the capture took place. Moreover, in the latter case the claimants were awarded costs against the actual captor. Where two convoying ships were detached to reconnoitre two ships in sight, which turned out to be a British frigate and an enemy's vessel, the frigate signalled her number, but made no signal of an enemy's ship ahead, thereby causing the convoying ships to be recalled. She afterwards made the capture, and the convoying ships were admitted as joint captors, on account of her neglect to make the proper signal. So,

[1] The 'Marianne,' 5 *Rob.*, 13; the 'Sacra Familia,' 5 *Rob.*, 362; the 'San José,' 6 *Rob.*, 244; 'L'Amitié,' 6 *Rob.*, 268; the 'Wanstead,' *Edw. R.*, 268.

[2] The 'La Flore,' 5 *Rob.*, 268, 271; the 'Amor Parentum,' 1 *Rob.*, 303.

[3] Roberts *v.* Hartley, 1 *Dougl.*, 311.

where a non-commissioned schooner which had had an engagement with an enemy's vessel, and though beaten off, was still hanging upon her, was induced to sheer off by the actual captor coming up and hoisting French colours, the claim of the Admiralty to joint capture for the schooner was sustained by the prize court.[1]

Distribution of prize to joint captors

§ 25. The distribution of prize among joint captors is usually regulated by proclamation, but in cases where such does not exist resort is had to the general rule of prize law established by the courts, which is that joint captors share in proportion to their relative strength. And this relative strength is usually determined by the number of men on board the actual taker and the ships assisting in the capture. The same rule seems applicable to the case of a joint capture by a public and private ship, whether the latter be commissioned or not; as also where an ally co-operates in the capture.[2]

Of bounty or head money

§ 26. The foregoing remarks respecting joint capture refer to benefit in *prize*; but some States also allow a *bounty*, or *head money*, for the taking or destroying of vessels of the enemy. Such provision is made by s. 42 of the English Naval Prize Act, 1864, which provides for such of the officers and crews of any British ships of war 'as are actually present at the taking or destroying of any armed ship' of the enemy. As grants of this description are considered as made to reward immediate personal exertion, and, moreover, are *public grants*, the courts construe them with much more rigour than they do the conflicting claims of individuals for shares of prize money. In these, as in all other public grants, the presumption is in favour of the grantor, and against the grantee. Hence, all claims of constructive joint capture, as from sight, association in chase, &c., are rejected. Originally the reward was confined to actual combat only; but the result of cases decided in the early part of this century shows that where a capture can be considered as a continuation of a general action, the whole fleet is equally entitled to head money, notwithstanding the particular combat and formal taking or destroying by a single ship belonging to the

[1] The 'Herman Parlo,' 3 *Rob.*, 8; the 'Eendraught,' 3 *Rob.*, appen., 35; the 'Spankler,' 1 *Dod. R.*, 359; the 'Waaksamheid,' 3 *Rob.*, 1; 'La Virginie,' 5 *Rob.*, 124; the 'Robert,' 3 *Rob.*, 194.

[2] Roberts *v.* Hartley, *Doug. R.*, 311; Duckworth *v.* Tucker, 2 *Taunt. R.*, 7; the 'Despatch,' 2 *Gallis. R.*, 1; the 'Twee Gesuster,' 2 *Rob.*, 284, note; the 'Le Franc,' 2 *Rob.*, 285, note.

fleet; that it is otherwise where the capture is not the immediate consequence of the general action; that in a general engagement there can be no distinction of combatants, the whole fleet is supposed to contend with the whole opposing force; that it is often so in fact, and always so in supposition of the law; that if the capture is made under such circumstances as to destroy all supposition of a continuity of the general engagement, the court will pronounce against the claim of the fleet to share in the head money.[1] There is, however, some dissimilarity between the wording of the older prize Acts and the existing one. It has been held in the United States under s. 2 of the Act of Congress of July 17, 1862 (12 *Stat. at L.*, 606), which provides for distribution of prize money, according to the relative force of the vessel or vessels making the capture, as compared with that of the captured vessel, that it was proper to consider as the capturing force not only the flag-ship which, in fact, inflicted the damage received by the captured vessel, but also any other vessels which, by diverting the fire of the enemy, &c., contributed to the capture.[2]

Collusive captures

§ 27. In all cases of collusive captures, the captors, whether single or joint, acquire no title to the prize, and the captured property is condemned to the government. If collusion be alleged, the usual simplicity of the prize proceedings is departed from in order to discover the fraud, if any exist. Evidence invoked from other prize causes is sometimes resorted to, as proof of collusion. Thus, where the same vessel has been proved guilty of collusion in another case, during the same cruise, the court will take cognisance of that fact in the claim before it. The rules of maritime capture generally will decree forfeiture of the rights of prize, against the captors, for gross irregularity or fraud, or for any other criminal conduct. Although the capture may be a good prize, if there should prove to be fraud and collusion between the captors and the captured, the former will have forfeited their rights, and the

[1] The 'Clarinde,' 1 *Dod. R.*, 436; 'La Gloire,' *Edw. R.*, 280; 'L'Alerte,' 6 *Rob.*, 238; the 'Ville de Varsovie,' 2 *Dod. R.*, 301; 'El Rayo,' 1 *Dod. R.*, 42; the 'Babilon,' *Edw. R.*, 39; 'L'Elise,' 1 *Dod. R.*, 442; the 'Dutch Schuyts,' 6 *Rob.*, 48; the 'Matilda,' 1 *Dod. R.*, 367; the 'San Joseph,' 6 *Rob.*, 331; the 'Uranie,' 2 *Dod. R.*, 172; 'La Francha,' 1 *Rob.*, 157; the 'Santa Brigada,' 3 *Rob.*, 58; the 'Bellone,' 2 *Dod. R.*, 343.

[2] The ironclad 'Atlanta,' 3 *Wall.*, 425, affirming 2 *Am. Law. Rep. N. S.*, 675.

property is condemned to the government generally. Forfeiture may, also, be declared in favour of the government for other acts of misconduct, and for wilful and obstinate violation of duty on the part of the captors.[1]

Forfeiture of claims to prize

§ 28. So, in all cases of forfeiture of interest in the prize by the captors, the condemnation is to the government. The captor may forfeit his right of prize in various ways: as, by an unreasonable delay in bringing the question of prize or no prize to an adjudication by a competent court; by unnecessarily taking the captured vessel to a neutral port; by cruel treatment of the captured crew; by breaking bulk on board, except in case of necessity; by embezzlement; by breach of instructions, or any offence against the law of nations, &c. But irregularities on the part of captors, originating in mere mistake or negligence, which work no irreparable mischief, and are consistent with good faith, will not forfeit their right of prize. In order that a prize court may decree forfeiture or restitution, it is not necessary that the prize itself be brought within its jurisdiction; it is sufficient that a proceeding be instituted by the claimants against the captor. Thus, if the prize be lost at sea, the court still has jurisdiction of the case, and may proceed to its adjudication at the instance of either the captors or the claimants. So, if captured property be converted by the captors, the jurisdiction of the prize court over the case continues; it may always proceed *in rem*, wherever the prize, or the proceeds of the prize, can be traced to the hands of any person whatever; and this it may do, notwithstanding any stipulation in the nature of bail already taken for the property. But the court may exercise a sound discretion whether it will interfere in favour of the captors, in

[1] Kent, *Com. on Am. Law*, vol. i. p. 359; the 'Johanna Tholen,' 6 *Rob.*, 72; the 'George,' 1 *Wheat. R.*, 408; Oswell *v.* Vigne, 15 *East.*, 70; the 'George,' 2 *Wheat. R.*, 278; the 'Experiment,' 8 *Wheat. R.*, 261; the 'Bothnea' and the 'Jahnstoff,' 2 *Wheat. R.*, 169.

By section 37 of the Naval Prize Act, 1864 (27 and 28 Vict., cap. 25), a prize court, on proof of any offence against the law of nations, or against this Act, or any Act relating to naval discipline, or against any Order in Council, or royal proclamation, or of any breach of her Majesty's instructions relating to prize, or of any act of disobedience to the orders of the Lords of the Admiralty, or to the command of a superior officer, committed by the captors in relation to any ship or goods taken as prize, or in relation to any person on board any such ship, may, on condemnation, reserve the prize to her Majesty's disposal, notwithstanding any grant that may have been made by her Majesty in favour of captors.

case the captured property has been unjustifiably or illegally converted, and in case the disposition of the captured vessel and crew has not been according to duty. If no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture, and award restitution and damages against the captor ; although the seizure of the prize was originally lawful, and made upon probable cause. And the same rule prevails where the sale was justifiable, and the captor has delayed, for an unreasonable time, to institute proceedings to condemn it. Upon a libel filed by the captured, as for a marine trespass, the courts of the United States will refuse to award a monition to proceed to adjudication on the question of prize or no prize, but will treat the captor as a wrongdoer from the beginning.[1]

[1] Wildman, *Int. Law*, vol. ii. p. 298 ; the 'Susannah,' 6 *Rob.*, 48 ; the 'Falcon,' 6 *Rob.*, 194 ; 'L'Ecole,' 6 *Rob.*, 220 ; 'La Dame Cécile,' 6 *Rob.*, 257 ; the 'Pomona,' 1 *Dod. R.*, 25 ; the 'Arabella and Madeira,' 1 *Gallis. R.*, 368 ; Jecker et al. *v.* Montgomery, 13 *Howard R.*, 516.

The settled rule is to require the captors of a vessel to bring in for examination her master and principal officers and some of her crew (the 'Jane Campbell,' *Blatchf. Pr. Cas.*, 101), but an omission to do so is not a sufficient ground to defeat a capture made by a *government* vessel. (The 'Shark,' *ibid.* 215.) Captors are not bound to allow the captured crew to navigate the ship, nor are the latter bound to perform such duty. The captors are bound to put on board a sufficient crew to navigate the ship. (The 'George,' 1 *Mas.*, 24.) Persons found on board of a captured vessel do not pass with the vessel and cargo into judicial custody. But they are subject to the control of the court for the purpose of examination, and their subsequent discharge or detention rests with the officers of the naval service, according to its rules. (The 'Salvor,' 4 *Phil.*, 409.)

Misconduct on the part of the captors, *e.g.* wrongful spoliation of property on board a prize, or separation of officers and crew from her, *may* destroy the legality of the capture, and may subject the captors personally to punishment for the infrigement of the laws of maritime warfare. The right of seizure is dependent on its lawful use. (The 'Anna Maria,' 2 *Wheat.*, 327 ; the 'Jane Campbell,' *Blatchf. Pr. Cas.*, 101.)

Prize law prohibits, under penalty of the disallowance of the right of prize to the captors, and the positive infliction of punishment by penalties and costs, any irregularities against the property seized or the captured crew, especially where the latter are neutral. (The 'Jane Campbell,' *suprà.*)

Where captures are made by public ships, the actual wrongdoer alone is responsible for any wrong done or illegality committed on the prize, except as respects acts done by members of the seizing vessel, in obedience to the orders of their superiors. (The 'Louisa Agnes,' *Blatchf. Pr. Cas.*, 107.)

Concerning the treatment of a captured crew, Sir W. Scott remarks : 'There are two parts of the charge to which it is necessary for me to advert. The first is the imputation of a practice which, if proved to have existed to the extent alleged and without necessity, must be pro-

Probable cause of seizure usually sufficient

§ 29. *Probable cause* of seizure is, by the general usage of nations and the decisions in Admiralty, a sufficient excuse in cases of capture *de jure belli*, and this question belongs exclusively to the court, which has jurisdiction to restore or condemn. The general principles, governing cases of this character, were embodied in the statute laws of the United States by the Act of June 26, 1812, s. 6, which provides that the courts of the United States, in which the case may be finally decided, 'shall and may decree restitution, in whole or in part, when the capture shall have been made without *just cause*; and if made without *probable cause*, or otherwise unreasonably, may order and decree damages and costs to the party injured.' If there be a reasonable suspicion, it is proper to make the capture, and submit the cause for adjudication before the proper tribunal, and, although the court should acquit without the formality of further proof, the captors will be justifiable,

nounced to be disgraceful to the character of the country, since no one who hears me will deny that to apply even to enemies modes of restraint which are unnecessary and at the same time convey personal indignity and personal suffering, is highly dishonourable. It is alleged that the Spanish crew, to the number of twenty-two persons, were put in irons. This is a fact that certainly requires much explanation, for I will not say there may not be cases in which such restraint may be necessary, and therefore justifiable. But the necessity must be urgent and evident. The captor when called upon for his explanation has furnished no apology but that suggested by his counsel. Admitting the motive to be truly stated, that this act was done for security, I am afraid it will not amount to a justification, because it was incumbent on the captor to pursue a proper purpose by proper means. It should be established, to the satisfaction of the court, that this species of security alone would have been sufficient for his preservation. At the same time, I must say that the misconduct appears to have proceeded, rather from an improper notion of security, than from any intention to inflict pain or personal indignity. If any such malignant motive had been proved, I should have thought it my duty to pursue this matter much further.' (The 'Juan Baptista,' &c., 5 *Rob.*, 39; *see* also the 'Die Fire Damer,' *ibid.* 357.)

The 'Java's' men were treated by the American officers in a disgraceful manner. The moment the prisoners were brought on board the 'Constitution' they were handcuffed and pillaged of almost everything they possessed. True, Lieut.-General Hislop got back his valuable service of plate and other British officers were treated civilly. (*James, Nav. Hist.*, vol. vi. 136.)

After the 'Berwick' had been taken by the French squadron, the officers and crew were distributed about among the different ships, without being allowed to take any clothes except those on their backs, and were in every other respect most shamefully treated. (*Ibid.* vol. i. 255.)

Captors are not liable for damages in a case where the vessel captured presents probable cause for the capture, even though she was led into the predicament in which she is found involuntarily, and by the mistake of the revenue officers of the captors' own government. (The 'La Manche,' 2 *Sprague*, 207.)

by reason of such probable cause; but where the seizure is wholly without excuse, they are liable for costs, and for the damages which ensue from the seizure, and such damages and costs will be decreed to the party injured. The liability of the captor for damages and costs depends, in general, upon his good faith and intentions; a court will seldom impose damages for a mere error of judgment, unless the irregularity is very gross, and works a serious injury to the claimants. They are never responsible for the neglect or error of the captured vessel. Thus, if a vessel, although not liable to condemnation, has defective documents on board, or does not show proper papers, the captor is not liable for either costs or damages, but, on the contrary, the court will generally allow him costs and expenses, to be paid by the claimants to whom the restitution is made. But, if he unreasonably delay to procure an adjudication, or is otherwise guilty of negligence or bad faith, he is liable for costs and damages. The owners of captured property, which is lost through the fault or negligence of the captors, are entitled to compensation in damages, and the value of the vessel, cost of cargo, with all charges, and the premium of insurance if paid, are allowed in ascertaining the amount of damages. Where a ship was justifiably captured but not liable to be condemned, and was lost by the culpable negligence of the prize master, restitution in the value of ship and freight was decreed. Where freight is decreed, it is to be estimated on the footing of a fair commercial profit. A captor is liable for demurrage, in all cases of unjustifiable delay; for sending his prize into an inconvenient port; for loss of the ship if he refuses to take a pilot, but not where there is a regular pilot on board; for deficiency of cargo; but not, without negligence or misconduct, for goods stolen from a warehouse after commission of unlivery. All claims to costs and damages are extinguished by accepting an unconditional release of the vessel.[1]

[1] The 'Palmyra,' 12 *Wheat. R.*, 1; the 'George,' 1 *Mason R.*, 24; Locke *v.* the United States, 7 *Cranch. R.*, 339; Shattuck *v.* Maley, 1 *Wash. R.*, 245; Jecker et al. *v.* Montgomery, 13 *Howard R.*, 505.

As to what constitutes probable cause, which will justify a capture, *see* the 'Dashing Wave,' 5 *Wall.*, 170; the 'George,' 1 *Mas.*, 24; the 'La Manche,' 2 *Sprague*, 207. Vessels which pick up enemy's goods, thrown overboard during a chase, are entitled to them as captors, and not as salvors. (The 'Victory,' *ibid.* 226.)

A ship of war which after search captures a merchant vessel without reasonable grounds, and sends her in for adjudication as prize, is

When captors are liable for costs and damages

§ 30. Questions with respect to the liability of admirals of fleets, and commanders of squadrons, for captures made by vessels and officers under their commands, and of owners of privateers for the acts of their captains, have often been adjudicated upon by the courts. The commander of a squadron,

answerable for the capture, not for the search. ('La Jeune Eugénie,' 2 *Mason*, 439.)

During the Crimean war of 1854, the 'Ostee,' sailing under the Mecklenburg flag from Cronstadt to Elsinore, was seized by a British ship of war and sent to London for adjudication as prize. Upon the ship's papers and the examination of the crew on the usual interrogatories, there appeared to be no ground for condemnation. The ship and cargo were restored to the claimants, but without costs or damages. On appeal to the Privy Council, their lordships observed in the judgment, that the restitution of a ship and cargo may be attended, according to the circumstances of the case, with any one of the following consequences:—1st, the claimants may be ordered to pay to the captors their costs and expenses; or, 2nd, the restitution may be simple restitution, without costs or expenses or damages to either party; or, 3rd, the captors may be ordered to pay costs and damages to the claimants. These provisions meet the various circumstances, not ultimately affording ground for condemnation, under which captures may take place. A ship may by her own misconduct have occasioned her capture, and in such a case it is very reasonable that she should indemnify the captors against the expenses which her misconduct has occasioned; or she may be involved, with little or no fault on her part, in such suspicion, as to make it the right or even the duty of a belligerent to seize her. There may be no fault either in the captor or the captured, or both may be in fault; and in such cases there may be *damnum absque injuriâ*, and no ground for anything but simple restitution. Or there may be a third case, where not only the ship is in no fault, but she is not by any act of her own, voluntary or involuntary, open to any fair ground of suspicion In such a case a belligerent may seize at his peril and take the chance of something appearing on investigation to justify the capture; but if he fails in such a case it seems very fit that he should pay the costs and damages which he has occasioned. Their lordships considered that the case before them was brought within the last of these rules, and gave the claimants their costs in the court below, but no costs in the Appeal. They also gave them damages, the amount to be referred to the Registrar and merchants. The amount was subsequently paid by the British Government. Costs and damages, when decreed against the captors, are not inflicted as a punishment on the captors, but as affording compensation to the injured party. In order to exempt captors from costs and damages, in case of restitution, there must be some circumstances connected with the ship or cargo, affording reasonable ground for belief that the ship or cargo might prove a lawful prize. What amounts to such a probable cause, as to justify a capture, is incapable of definition and is to be regulated by the peculiar circumstances in each case. It is not necessary to prove vexatious conduct on the part of the captors, to subject them to condemnation in costs and damages. Neither will honest mistake, though occasioned by an act of government, relieve the captors from liability to compensate a neutral for damages, which the captors by their conduct have caused the neutral to sustain. In the course of the judgment, their lordships further observed:—'The law which we are to lay down, cannot be confined to the British Navy; the rule must be applied to captors of all

or the admiral of a fleet, is liable to individuals for the trespasses of those under his command, in case of actual presence and co-operation, or of positive orders. Where, in such cases, the capture has actually taken place, the prize master is considered as a bailee to the use of the whole fleet or squadron, who are to share in the prize money, and thus the commander may be made responsible; but not so as to mere trespasses, unattended with a conversion to the use of the fleet or squadron. With respect to *costs and damages*, it is a general rule in relation to public ships, that the actual wrongdoer, and he alone, is responsible. It is not meant by this that the crew of the capturing ship are responsible for a seizure made in obedience to the commands of their superior; but that the person actually ordering the seizure is the one to be held liable for costs and damages. Thus, the commander of a single vessel is liable for the acts of all under his command, and the commander of a fleet or squadron, in case of actual presence and co-operation, or of positive orders. In the United States he is also held responsible for acts done under his *permissive* orders;

nations. No country can be permitted to establish an exceptional rule in its own favour, or in favour of particular classes of its own subjects. On the Law of Nations, foreign decisions are entitled to the same weight as those of the country in which the tribunal sits. America has adopted almost all her principles of prize law from the decisions of English courts, and whatever may have been the case in former times, no authorities are now cited in English courts, in cases to which they are applicable, with greater respect than those of the distinguished jurists of France and America. Whatever is held in England to justify or excuse an officer of the British Navy, will be held by the tribunals of every country, both on this and the other side of the Atlantic, to justify or excuse the captors of their own nations.' (Schacht *v.* Otter, 9 *Moore, Privy Council Cas.*, 150.)

Prize courts deny damages, or costs, in cases of seizure made upon 'probable cause,' that is to say, where there were circumstances sufficient to warrant suspicion, though not to warrant condemnation. (The 'Thompson,' 3 *Wall.*, 155; affirming S. C., *Blatchf. Pr. Cas.*, 377.)

Where a ship is *bonâ fide* seized as a prize, and afterwards released without any suit being instituted against her, the owner cannot sustain an action at common law for the seizure. His remedy, if any, is in the Court of Admiralty. (Faith *v.* Pearson, 6 *Taunt.*, 439.)

No action lies at common law for false imprisonment, where the imprisonment was merely in consequence of taking a ship as prize, although the ship has been acquitted. (Le Caux *v.* Eden, 2 *Dougl.*, 594.)

It was held a good defence, in an action for taking a steam vessel, that the defendant was an admiral in the Portuguese navy, and that he took the vessel as a prize, and that it became forfeited to the Queen of Portugal, although he was a natural-born subject of Great Britain and had accepted his commission without license of the King of England. (Dobree *v.* Napier, 3 *Scott*, 201.)

but not so in England. The captain, there, must be looked to as the actual wrongdoer, and the admiral is responsible to him if he has given express orders for the particular seizure.[1]

Of owners of privateers

§ 31. In the case of privateers, the owners, as well as the masters, are responsible for the damages and costs occasioned by illegal captures, and this to the extent of the actual loss and injury, even if it exceed the amount of the bond usually given upon the taking out of the commission. But such owners who are only constructively liable are not bound to the extent of vindictive damages, although the original wrongdoers, in case of gross and wanton outrage in an illegal seizure, may be made responsible beyond the loss actually sustained. The sureties to the bond are responsible only to the extent of the sum in which they are bound. But, if a person appear on

[1] Kent, *Com. on Am. Law*, vol. i. p. 100; Phillimore, *On Int. Law*, vol. iii. § 457; the 'Mentor,' 1 *Rob.*, 177; the 'Diligentia,' 1 *Dod. R.*, 404; the 'Eleanor,' 2 *Wheat. R.*, 346.

An action between the single ships of two nations at peace is rare. Still more rare is an action, under similar circumstances, between two squadrons. Unfortunately an action was fought in 1804 between an English and Spanish squadron in open day; not through any accident, but under express orders from the government of one of the combatants; and, so far from the matter being afterwards made up, it led to an almost immediate declaration of war by the party who had to complain of the aggression. Towards the end of the summer of 1804 the British Government received intelligence (which, however, was afterwards disproved by the Spanish Government) that an armament was fitting out in Ferrol, that a considerable force was already collected there, and that the French troops were near at hand. Immediately on this information the British Admiralty despatched a squadron off Cadiz to intercept and detain, by force or otherwise, the four Spanish frigates known to be bound to that port with an immense quantity of specie, which they were bringing from Monte Video. On Oct. 5 the four British frigates sighted the Spanish frigates and immediately made sail in chase, and upon the refusal of the Spanish commanding officer to allow the squadron to be detained, an action was commenced, during which one of the Spanish ships blew up and the other three were taken by the British ships. Their cargoes netted very little short of a million sterling. Many persons, who concurred in the expediency, doubted the right of detaining these ships; and many again, to whom the legality of the act appeared clear, were of opinion that a more formidable force should have been sent to execute the service, in order to have justified the Spanish admiral in surrendering without an appeal to arms. On Nov. 27 an order was made to make reprisals on English property, and on Dec. 12 war was declared against England by Spain. (*Jas. Nav. Hist.*, vol. iii. 280.)

Where two vessels engaged in combat under a mutual mistake in regard to each other's character, and the vessel attacked captured the other, it was held in the United States that the capture was not unlawful, being apparently required in self-defence; and that the subsequent bringing in of the vessel for adjudication was not a cause for giving damages. (The 'Marianna Flora,' 11 *Wheat.*, 1.)

behalf of the captain of a privateer, and give security in his own name as principal in the stipulation, with other sureties, he is liable, in the same manner as the captain, as principal. A part owner of a privateer is not exempted from being a party to the suit, in consequence of having made compensation for his share to the claimant and received a release from him. A person may be holden a part owner of a privateer, although his name has never been inserted in the bill of sale or in the ship's register.[1]

Duties of prize master

§ 32. It is the duty of the prize master, immediately on his arrival in port, to institute proceedings in the proper court for the adjudication of his prize. He should also deliver over to the commissioner, or proper officer of the court, all the papers and documents found on board, and, at the same time, make affidavit that they are delivered up as taken, without fraud, addition, subdivision, or embezzlement. He should also have the master and principal officers, and some of the crew, of the captured vessel, brought in for examination. This examination should take place as soon as possible after the arrival of the vessel. Prize masters are considered as bailees to the use of the captors, who are to share in prize money. If the prize be lost by the misconduct of the prize master, or for neglecting to take a pilot, or to put on board a proper prize crew, the captors are held responsible. So, also, in claims for demurrage in not bringing in the prize in due time, or neglecting to have the case adjudicated before a competent court. Courts of prize have jurisdiction of all prize agents, and determine upon the legality of their appointment, and the disposition which they may make of the proceeds of sales of prizes, &c. If they pay such proceeds over to the captors without an order of the court, they are responsible to the owners of the cap-

[1] See also ch. xxii. § 25; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. c. 13; Brown, *Civil and Adm. Law*, vol. ii. p. 140; Pothier, *De la Propriété*, No. 92; Valin, *Sur l'Ordonnance*, liv. iii. tit. ix.; Talbot *v.* Three Brigs, 1 *Dal. R.*, 95; the 'Die Fire Damer,' 5 *Rob.*, 318; the 'Der Mohr,' 3 *Rob.*, 129; the 'Gerolama,' 3 *Hagg. R.*, 187; Del. Col. *v.* Arnold, 3 *Dall. R.*, 333; the 'Anna Maria,' 2 *Wheat. R.*, 327; King *v.* Ferguson, *Edw. R.*, 84; the 'Karasan,' 5 *Rob.*, 260; the 'William,' 4 *Rob.*, 214; Bello, *Derecho Internacional*, pt. ii. c. v. § 5; *Code de Commerce*, liv. ii. tit. iii. art. 217; Bedarride, *Droit Com.*, §§ 300 et seq. The distribution of the prize proceeds is generally directed by the agreement between the owners, officers, and crew; but if no agreement is executed, the Admiralty court will make distribution in proportion to the number, interest, and merits of the captors. (Keane *v.* the 'Gloucester,' 2 *Dall.*, 36.)

tured property for the net amounts so received by them, in case restitution is received. The duties and responsibilities of prize agents, where not regulated by statutes, are usually determined by the rules and orders of the courts.[1]

[1] The 'Speculation,' 2 *Rob.*, 293; Del. Col. *v.* Arnold, 3 *Dall. R.*, 333; Wilcox *v.* U. Ins. Co., 2 *Binn. R.*, 574; Willis *v.* Commissioners, 5 *East. R.*, 22; the 'Noysomhed,' 7 *Ves. R.*, 593; Smart *v.* Wolff, 3 *Durn. and East.*, 323; the 'Pomona,' 1 *Dod. R.*, 25; the Herkimer,' *Stew. R.*, 328; the 'Louis,' 5 *Rob.*, 146; the 'Polly,' 5 *Rob.*, 147, note; the 'Printz Henrick,' 6 *Rob.*, 95; the 'Exeter,' 1 *Rob.*, 173; the 'Princesa,' 2 *Rob.*, 31; the 'St. Lawrence,' 2 *Gallis. R.*, 19; the 'Brutus,' 2 *Gallis. R.*, 526; Bingham *v.* Cabot, 3 *Dallas R.*, 19; Kean *v.* Brig 'Gloucester,' 2 *Dall. R.*, 36; Hill *v.* Ross, 3 *Dall. R.*, 331; Penhallow *v.* Doane, 3 *Dall. R.*, 54.

A sale of captured property, by authority of the captors, before sentence of condemnation, if the property be afterwards condemned, is valid. (Williams *v.* Armroyd, 7 *Cranch.*, 423.)

The captor has no such interest in the vessel, which is re-captured before condemnation, as entitles him to require the government to press a claim for damages against the neutral government, in one of whose courts the prize was illegally re-captured. (Stewart *v.* U. S., 1 *Ct. of Cl. R., Nott*, 2 *H.*, 113.)

The title of the absolute owner prevails in a prize court over the interests of a lien holder, whatever the equities between those parties may be. (The 'Winifred,' *Blatchf. Pr. Cas.*, 2.)

Where a merchant purchased a cargo of coffee for enemy correspondents, partly with their funds and partly with his own, and shipped it under a bill of lading by which it was to be delivered to his order, and with a statement thereon that part of the coffee was the property of neutrals,—Held, that as he had the legal title and possession, he was not to be deemed a lien holder, but rather a trustee with the right of retention until his advance should be repaid. In such cases, a prize court will look beyond the legal title, dealing with the beneficiary interest. (The 'Amy Warwick,' 2 *Sprague*, 150.)

Cotton belonging to the Confederate Government was sold by a person who came through the rebel lines for that purpose to A. A., procuring the assistance of United States troops, proceeded to where the cotton was stored in charge of an officer of the Confederate Government, secured it, and forwarded it to a military post of the United States. The officer in command at this post seized the cotton and turned it over to the quartermaster. Subsequently the quartermaster delivered the cotton to A., who shipped it North. Before it reached its destination it was again seized by military authority. After the release of the cotton by the quartermaster, and prior to the last seizure, A. sold it to third parties, who were informed of the facts. It was held, that the title of the United States related back to the time of original capture; that if the surrender of the cotton to A. was through a fraudulent connivance between him and the quartermaster, such surrender was not voluntary, within the legal meaning of the term; that the third parties (the claimants) having knowledge of the facts, were not protected, and that the cotton must be condemned. (United States *v.* Two hundred and sixty-nine and a half Bales of Cotton, *Rev. Cas.*, 2, 64.)

CHAPTER XXXII

PRIZE COURTS, THEIR JURISDICTION AND PROCEEDINGS

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Validity of a maritime capture, how determined

§ 1. IT has been shown in chapter xxi. that, in war on land, the title to personal and movable property is considered as lost to the owner as soon as the captor has acquired a *firm possession*, which, as a general rule, is considered as taking place after a lapse of *twenty-four hours*; but that this rule does not, at least in Great Britain and the United States, apply to maritime captures, which are held in abeyance till the legality of the capture is determined by some court of competent jurisdiction. A different principle, however, is applied in case of the recapture of property of the Continental nations of Europe, who adhere to the old rule of *perductio infra præsidia*, or of reclamation *ante occasum solis*. Kent, and other modern writers of authority, contend for the absoluteness of the rule, as one fully established by usage and incorporated into the code of international jurisprudence, that 'the property is not changed in favour of the neutral vendee or recaptor, so as to bar the original owner, until a regular sentence of condemnation has been pronounced by some court of competent jurisdiction, belonging to the sovereign of the captor; and the purchaser must be able to show documentary evidence of that fact to support his title.' Such is undoubtedly the practice of

Great Britain and the United States; but with respect to recaptures it is by no means universal, some States retaining the ancient practice, and others adopting the rule of reciprocity. But this question will be particularly considered in chapter xxxv. under the head of recaptures.[1]

Why prize courts of other countries cannot condemn

§ 2. The validity of a maritime capture must be determined by a prize court of the government of the captor, and cannot be adjudicated by the court of any other country. The reason of this rule is based upon the responsibility which the law of nations imposes upon the government of the captor in case of unlawful condemnation of the captured property. If the court of any country other than that of the captor were to condemn, the government of the captor could not be held responsible to the government whose citizen is unlawfully deprived of his property. This rule necessarily excludes the jurisdiction of a prize court of an ally over captures made by his co-belligerent. The government of the captor is held responsible to other States for the acts of his own subjects, but not for those of his allies. It is, therefore, evident that the courts of an ally cannot determine whether captured property shall be restored to the original owner, or whether the captor's government shall assume the responsibility of its condemnation. Sir R. Phillimore asserts, that the question of prize may be adjudicated in 'the court of the captor *or* of his ally,' on the ground that *unam constituunt civitatem*; but none of the authorities to which he refers support his position; they refer to the *locality* of the prize when condemned, or to the *place* where the court was sitting at the time of condemnation, but not to the origin of the court itself; in none of the cases to which he refers was it held that the *court* of an ally may condemn. On the contrary, Chancellor Kent says distinctly, 'The prize court of an ally *cannot* condemn;' and Wheaton is equally distinct. But where the property is carried into the port of an ally, there is nothing to prevent the government of the latter, *although it cannot itself condemn*, from permitting an officer of the other government to exercise that final act of hostility.[2] For the same reason, the condemnation of a capture cannot be pronounced in the prize court of a neutral; for, as the government

[1] Kent, *Com. on Am. Law*, vol. i. pp. 101, 102; Bello, *Derecho Internacional*, pt. ii. cap. v. § 4.

[2] Oddy *v.* Bovill, 2 *East.*, 473.

of the captor is answerable to other States for such condemnation, it is proper that it should be made by its own courts. Similarly, the liberty of a belligerent to sell prizes in a neutral territory is not a perfect right, but subject to the regulation of the neutral government. Moreover, if the courts of neutral countries were allowed to determine prize questions, their decisions would inevitably involve their respective governments in hostilities with one or the other of the belligerent parties, or with other neutral States, the property of whose citizens might be condemned for some violation of neutral duties. Their exclusion rests not only on the fact that the exercise of this authority would be inconsistent with the neutral character, but also on the well-established practice and the usage of nations.[1] The sentence of a court of Admiralty, sitting under a commission from a belligerent power, in a *neutral country*, will not be recognised in the British courts; and this even although, the forms of an independent neutral government being preserved, the belligerent possesses the real sovereignty.[2]

Apparent exceptions to rule

§ 3. There are two apparent exceptions to this exclusive jurisdiction of the prize courts of the captor's country over questions of prize: 1st, where the capture is made within the territory of a neutral State, and, 2nd, where it is made by a vessel fitted out within the territory of the neutral State. In either of these cases the judicial tribunals of the neutral

[1] Kent, *Com. on Am. Law*, vol. i. p. 103; Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. §§ 13, 16; Phillimore, *On Int. Law*, vol. iii. §§ 365 et seq.; Hubner, *De la Saisie des Bâtiments*, &c., liv. i. ch. xi. § 8; Martens, *Précis du Droit des Gens*, liv. viii. ch. vii. § 312; the 'Flad Oyen,' 1 *Rob.*, 135; the 'Perseverance,' 2 *Rob.*, 240; the 'Kierlighett,' 3 *Rob.*, 95; Havelock *v.* Rockwood, 8 *Durn. and East*, 268; the 'Invincible,' 2 *Gallis. R.*, 28; 1 *Wheat. R.*, 238; Maissonnaire *v.* Keating, 2 *Gallis. R.*, 224; the 'Finlay and William,' 1 *Peters R.*, 12; Wheelwright *v.* Depeyster, 1 *Johns. R.*, 471; Page *v.* Lenox, 15 *Johns. R.*, 172.

[2] Donaldson *v.* Thompson, 1 *Camp.*, 429; Smith *v.* Surridge, 4 *Esp.*, 25.

On the breaking out of the war between Great Britain and France in 1793 the British Government complained to the United States that it was contrary to the usage of nations, and not warranted by the stipulations of any treaty between the United States and France, that a French consul in the United States should assume judicial authority over, and condemn as legal prize, together with their cargoes, British vessels captured by French ships of war. The United States Government admitted that such proceeding on the part of a French consul was an act of disrespect to the United States, and declared that his procedure was a mere nullity and utterly void.

State have jurisdiction to determine the validity of captures so made, and to vindicate its own neutrality by restoring the property of its own subjects, or of other States in amity with it. 'A neutral nation,' says the Supreme Court of the United States, 'which knows its duty, will not interfere between belligerents, so as to obstruct them in the exercise of their undoubted right to judge, through the medium of their own courts, of the validity of every capture made under their respective commissions, and to decide on every question of prize law which may arise in the progress of such discussion. But it is no departure from this obligation if, in a case in which a captured vessel be brought, or voluntarily comes *infra præsidia*, the neutral nation extends its examination so far as to ascertain whether a trespass has been committed on its own neutrality by the vessel which has made the capture. So long as a nation does not interfere in the war, but professes an exact impartiality toward both parties, it is its duty, as well as right, and its safety, good faith, and honour demand of it, to be vigilant in preventing its neutrality from being abused, for the purpose of hostility against either of them. . . . In the performance of this duty, all the belligerents must be supposed to have an equal interest; and a disregard, or neglect of it, would inevitably expose a neutral nation to the charge of insincerity, and to the just dissatisfaction and complaints of the belligerent, the property of whose subjects should not, under such circumstances, be restored.' These are not, properly considered, exceptions to the general rule of prize jurisdiction, but are cases where the courts of a neutral State are called upon to interfere for the purpose of maintaining and vindicating its neutrality.[1]

Rule varied by municipal regulations

§ 4. Attempts have been made by some States to give to their own tribunals prize jurisdiction of all captured property brought within their territorial limits. Such a municipal regulation was made by France, in 1681, and its justice was defended on the ground of compensation for the privilege of asylum granted to the captor and his prizes in a neutral port. 'There can be no doubt,' says Wheaton, 'that such a condition may be annexed by the neutral State to the privilege

[1] The 'Estrella,' 4 *Wheat. R.*, 298; the 'Santissima Trinidad,' 7 *Wheat. R.*, 284; 'La Amistad de Rues,' 5 *Wheat. R.*, 385; Brig 'Alert' and Cargo *v.* Blas Moran, 9 *Cranch R.*, 359; 'La Concepcion,' 6 *Wheat. R.*, 235; Talbot *v.* Jansen, 3 *Dallas R.*, 133.

of bringing belligerent prizes into its ports, which it may grant or refuse, at its pleasure, provided it be done impartially to all the belligerent powers; but such a condition is not implied in a mere general permission to enter the neutral ports. The captor who avails himself of such a permission, does not thereby lose the military possession of the captured property, which gives to the prize courts of his own country exclusive jurisdiction to determine the lawfulness of the capture. . . . The claim of any neutral proprietor, even a subject of the State into whose ports the captured vessel or goods may have been carried, must, in general, be asserted in the prize court of the belligerent country, which alone has jurisdiction of the question of prize or no prize.'[1]

By treaty stipulations

§ 5. The rule has sometimes been varied by treaty stipulations. Thus, in the treaty between the United States and the Republic of Columbia in 1825, art. 21, and between the United States and Chile in 1832, art. 21, it was agreed that the established courts for prize cases in the country to which the prizes may be conducted, should alone take cognisance of them. But it must be observed that such stipulations can bind only those who make the engagements. The courts of neutral States would not be bound to exercise such jurisdiction, nor could States not parties to the treaty be debarred from claiming the right of trial by their own prize courts, which alone, under the general law of nations, have jurisdiction of prize causes.[2]

Prize courts in general

§ 6. There is evidently a wide distinction between the ordinary municipal tribunals of the State, proceeding under the municipal laws as their rule of decision, and prize tribunals appointed by its authority, and professing to administer the law of nations to foreigners as well as subjects. 'The ordinary municipal tribunals,' says Wheaton,[3] 'acquire jurisdiction over the person or property of a foreigner, either *expressed* by his voluntarily bringing the suit, or *implied* by the fact of his bringing his person or property within their territory. But when courts of prize exercise their jurisdiction over vessels captured at sea, the property of foreigners is brought by force within the territory of the State by which those tribunals are

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 14.
[2] *United States Statutes at Large*, vol. viii. pp. 316, 439.
[3] *Elem. Int. Law*, suprà.

constituted. By natural law, the tribunals of the captor's country are no more the rightful exclusive judges of captures in war, made on the high seas from under the neutral flag, than are the tribunals of the neutral country. The equality of nations would, on principle, seem to forbid the exercise of a jurisdiction thus acquired by force and violence, and administered by tribunals which cannot be impartial between the litigating parties, because created by the sovereign of the one to judge the other. Such, however, is the actual constitution of the tribunals in which, by the positive international law, is vested the exclusive jurisdiction of prizes taken in war.' From this evident and wide distinction between ordinary cases of litigation, under municipal law, and the condemnation of maritime captures, under the law of nations, there has resulted the rule that no court can have prize jurisdiction unless it be expressly made a prize tribunal by the authority of the State to which it belongs. But, the organisation of the court, and the manner of exercising this jurisdiction, must depend upon the constitution and local laws of each State, and are different in different countries.

English prize courts

§ 7. The Admiralty Division of the High Court of Justice, in England, is theoretically divided into two tribunals, one of which is called the *instance court*, and the other the *prize court*; the former having generally all the jurisdiction of the Admiralty, except in prize cases, and the latter, acting under a special commission, distinct from the usual commission given to judges of the Admiralty, to enable the judge, in time of war, to assume the jurisdiction of prizes. 'The manner of proceeding,' says Lord Mansfield, 'is totally different; the whole system of litigation and jurisprudence in the prize court is peculiar to itself; it is no more like to the court of Admiralty than it is to any other court in Westminster Hall. The courts of Westminster Hall never have attempted to take cognisance of the question, *prize or no prize*; not from the locality of being done at sea, as I have said, but from their incompetence to embrace the whole of the subject.' [1]

[1] Lindo *v.* Rodney, *Doug. R.*, 613; *ex parte* Lynch, 1 *Madd. R.*, 15. The Court of Admiralty has jurisdiction to entertain prize proceedings commenced after the cessation of war. (Cargo *ex* 'Katharina,' 30 *L. J. Adm.*, 21.) A court of Common Law cannot even incidentally decide a question of prize. (Maissonnaire *v.* Keating, 2 *Gall.*, 325; Bingham *v.* Cabbott, 3 *Dall.*, 19.) Questions of prize, or no prize, are exclusively of

§ 8. The constitution of the United States extends the judicial power 'to all cases of Admiralty and maritime jurisdiction.' Under the general head of *Admiralty jurisdiction* are included all captures and questions of prize, arising *jure belli*, as well as acts, torts, and enquiries strictly of civil cognisance, independent of belligerent operations and contracts, claims and services, purely maritime, and rights and duties appertaining to commerce and navigation. Prize jurisdiction, therefore, as a branch of Admiralty, belongs to the Federal courts.[1] 'It is obvious upon the slightest consideration,' says Story, 'that cognisance of all questions of prize, made under the authority of the United States, ought to belong exclusively to the national courts. How, otherwise, can the legality of the captures be satisfactorily ascertained, or deliberately vindicated? It seems not only a natural, but a necessary appendage to the power of war, and negotiation with foreign nations. It would otherwise follow, that the peace of the whole nation might be put at hazard at any time, by the misconduct of one of its members.' The District courts of the United States, as courts of *Admiralty*, are *prize* courts as well as *instance* courts. Their *prize* jurisdiction, however, was originally much questioned, on the ground that it was not an ordinary inherent branch of *Admiralty* jurisdiction, but an extraordinary power, requiring, as in England, a special commission, on the breaking out of the war, to call it into action. This question came up directly to the Supreme Court of the United States in 1794, and it was decided by the unanimous opinion of the judges, 'that every District court of the United States possesses all the powers of a court of Admiralty, whether considered as an *instance* or a *prize* court.' This decision was re-affirmed in other cases, and the jurisdiction claimed was expressly sanctioned by the Prize Act of June 26, 1812. The District courts of the United States are therefore *prize courts of Admiralty*, possessing all the powers incident to their character as such under the law of nations.[2]

Prize courts of the United States

Admiralty jurisdiction. (*Ibid.*) The question of prize, or no prize, or by whom taken, cannot be tried at Common Law. (Mitchell *v.* Rodney, 2 *Bro. P. C.*, 423.)

[1] A prize court is in its very constitution an international tribunal, controlled by the law of nations, not by municipal law (United States *v.* Bales of Cotton, *Rev. Cas.*, 2), but a municipal seizure is regulated by municipal law. (Hudson *v.* Guestier, 4 *Cranch.*, 293.)

[2] Conkling, *Treatise*, &c., p. 135; Glass et al. *v.* the sloop 'Betsey' et al., 3 *Dall. R.*, 6. In prize cases, the court of that district of the

The President cannot confer prize jurisdiction

§ 9. It has also been decided by the Supreme Court, that neither the President of the United States, nor any officer acting under his authority, can give prize jurisdiction to courts not deriving their authority from the constitution or laws of the United States. The alcalde of Monterey, a port of Mexico, in the possession and military occupation of the United States, as conquered territory, was appointed by the governor of California as a judge of Admiralty with prize jurisdiction, and the appointment was ratified by the President, on the ground that prize crews could not be spared from the squadron to bring captured vessels into a port of the United States. The Supreme Court held that such a court could not decide upon the rights of the United States, or of individuals, in prize cases, nor administer the laws of nations; that its sentence of condemnation was a mere nullity, and could have no effect upon the rights of any party.[1]

Court may sit in country of captor or of ally

§ 10. Having shown that the prize court of the captor's country has exclusive jurisdiction of the question of prize or no prize, and that no mere municipal court can exercise such jurisdiction, unless it is especially conferred by the constitution or local laws of the State to which it belongs,[2] we now come to the enquiry, where such court may sit or exercise its au-

United States, into which the property is carried and proceeded against, has jurisdiction. The mere carrying of a vessel, or of her cargo, seized on the high seas as prize of war, into any particular district, without institution there of any proceedings in prize, cannot affect or take away the jurisdiction over the property of the district of another district, in which the proceedings against the property may be instituted after the property has been carried into such other district. (The 'Peterhoff,' *Blatchf. Pr. Cas.*, 493.) Cotton captured as prize, and in the custody of the marshal, under a warrant from the prize court, is not liable to be proceeded against for the internal revenue tax, while in his custody. (The 'Victory,' 2 *Sprague*, 226.) A vessel was chased at sea while attempting to break blockade, and was driven on shore in the enemy's territory, and then captured with her cargo, and was wrecked after capture. Held, that a part of her cargo, which was brought into a district of the United States, might be condemned as prize of war by the District court. (The 'Pevensey,' *Blatchf. Pr. Cas.*, 628.) The officers and crew of a prize, in case of condemnation, are not entitled to wages from the prize property. Where a prize is condemned, the officers and crew who are sent in as witnesses in pursuance of the law of nations, are not entitled to witness fees or compensation for their necessary detention, from out of the prize property. (The 'Lilla,' 2 *Sprague*, 177; the 'Britannia,' *ibid.* 225.)

[1] Jecker et al. *v.* Montgomery, 13 *Howard R.*, 498.

[2] The proceedings of a prize court of the late Confederate States were of no validity in the United States, and a condemnation and sale by such a court did not convey any title to the purchaser, or confer upon him any right to give a title to others. (The 'Lilla,' 2 *Sprague*, 177.)

thority. We have already seen that the prize court of an ally cannot condemn; but the objections made to the jurisdiction of an ally's court do not apply to a court belonging to the country of the captor sitting in an ally's territory. It has been held by the English courts, that a prize carried into a State in alliance with the captors, and at war with the country to which the captured vessel belongs, or into the country of the captors, may be legally condemned there by a consul belonging to the nation of the captors. It was at one time supposed, that the authority of the 'Flad Oyen' was against the legality of such a condemnation, but Lord Stowell subsequently pointed out and explained the distinction.[1]

But not in neutral territory

§ 11. But a prize court of the captors cannot sit in a neutral territory, nor can its authority be delegated to any tribunal sitting in neutral territory. The reason of this rule is obvious. Neutral ports are not intended to be auxiliary to the operations of the belligerents, and it is not only improper but dangerous to make them the theatre of hostile proceedings. A sentence of condemnation by a belligerent prize court in a neutral port is, therefore, considered insufficient to transfer the ownership of vessels or goods captured in war, and carried into such port for adjudication. This question was first decided by the Supreme Court of the United States in 1794, and in 1799 it was re-examined and discussed at much length by Sir William Scott, who decided that an enemy's prize court, in neutral territory, could not lawfully condemn.[2]

In conquered territory

§ 12. The objections made to the establishment of a prize court in neutral territory would not apply to conquered territory in the possession and military occupation of the captors. Such territory is *de facto* within the jurisdiction of the conqueror, and a condemnation regularly made by a prize court legally established in such conquered territory would not be set aside for that reason alone. The *legality* of the court may, however, be a question of some difficulty, and must be determined by the constitution and local laws of the captor's country. It will, hereafter, be shown that, in this respect, the laws

[1] The 'Flad Oyen,' 1 *Rob.*, 135; the 'Christopher,' 2 *Rob.*, 209; the 'Harmony,' the 'Adelaide,' and the 'Betsey Kruger,' 2 *Rob.*, 210, note; Wheelwright *v.* Depeyster, 1 *Johns. R.*, 471; Pistoye et Duverdy, *Des Prises*, tit. 8.

[2] Glass et al. *v.* the sloop 'Betsey' et al., 3 *Dall. R.*, 6; the 'Henrick and Maria,' 4 *Rob.*, 45.

of different countries are very different; that the laws of Great Britain instantly extend over conquered territory; but that territory in the military occupation of the United States is not a part of the Federal union;[1] that when the conquest is confirmed, the inhabitants of such territory become entitled to the rights, privileges, and immunities guaranteed by the constitution, but that the action of Congress is requisite to extend the general laws of the United States over territory, even after cession or confirmation of conquest. It has already been shown that neither the executive nor military authorities of the United States have power to establish prize courts in conquered territory to administer the law of nations. But it is different with Great Britain; for, as the limits of the Empire are extended, *ipso facto*, by the conquest, and as the conquered territory becomes instantly a dominion of the crown, the king, who issues prize commissions of his own authority, may erect courts there for the exercise of such jurisdiction. In speaking of the island of Heligoland, which had been taken possession of by British forces, but had not been confirmed to Great Britain by a treaty of peace, Sir William Scott remarked: 'It might have erected a court there, for the exercise of Admiralty jurisdiction; and, if it did not, I presume it refrained from so doing because it was not thought that the public convenience required it. The enemy certainly had no right to say that a court of that kind should not be there erected.'[2]

Extent of jurisdiction of prize courts

§ 13. The ordinary prize jurisdiction of the Admiralty extends to all captures in war made on the high seas; to captures made in foreign ports and harbours; to captures made on land by naval forces; to surrenders made to naval forces alone, or acting conjointly with land forces; to captures made in rivers, creeks, ports, and harbours of the captor's own country in time of war, and to seizures, reprisals, and embargoes, in anticipation of war. It also extends to all ransom bills upon captures; to money received as a ransom, or commutation on a capitulation to naval forces, alone or jointly with land forces: in fine, to all uses of maritime capture arising *jure belli*, and to all matters incidental thereto. Prize courts also have ex-

[1] Courts established in a foreign country, by the command of an invading force, can have no jurisdiction in cases of prize. (Jecker *v.* Montgomery, 13 *How. R.*, 498.)

[2] Jecker et al. *v.* Montgomery, 13 *Howard R.*, 515; Cross et al. v. Harrison, 16 *Howard R.*, 165; the 'Flotina,' 1 *Dod. R.*, 452.

clusive jurisdiction and an enlarged discretion, as to allowance of freight, damages, expenses, and costs, and as to all torts, personal injuries, ill-treatments, and abuse of power, connected with maritime captures *de jure belli*, and they frequently award large and liberal damages in such cases. This rule rests upon the ground that where the prize court has the sole and exclusive jurisdiction of the original matter it ought also to have such jurisdiction of all its consequences, and of everything necessarily incidental thereto. It is, therefore, held in England that the courts of Common Law can have no jurisdiction at all of such incidental questions, and this doctrine has been reaffirmed by the courts of the United States. Indeed, so far as questions have been decided by the Federal courts of the United States, they have claimed and exercised a jurisdiction equally as ample and extensive as the prize courts of Great Britain. All cases of recapture are held to be cases of prize, and are to be proceeded with as such. It is understood in England that the Admiralty, merely by its own inherent powers, never exercises jurisdiction of captures, or seizures as prize, made on shore without the co-operation of naval forces. Such were the views of Lord Mansfield, and his opinion on this point was adopted by Sir William Scott. As before remarked, we know of no decision by the courts of the United States bearing directly upon the question; in the case of the 'Emulous,' although the court gave no opinion as to the right of the Admiralty to take cognisance of mere captures made on the land, exclusively by land forces, yet it was declared to be very clear, that its jurisdiction was not confined to captures *at sea*. But prize courts do not, in general, take jurisdiction of questions of mere *booty*.[1] If, however, the jurisdiction of a prize court has once attached, that is, if the capture be such as to bring it within the jurisdiction of the Admiralty, the process of the prize court will follow the goods on shore, and its jurisdiction still continues not only over the capture, but also over all questions incident to it. So, also, if the prize should be unwarrantably carried into a foreign port and there given up by the captors on security. In this respect the prize court holds a firmer jurisdiction than the instance court; for in cases of wreck and derelict, if the goods are once

[1] See, as to Great Britain, p. 79, *supra*.

on shore or landed, the cognisance of the Common Law attaches.[1]

Location of prize

§ 14. The next question for consideration is the locality of the captured property. If it be carried into a port of the captor's country, there can be no doubt respecting the jurisdiction of the prize court of the same country. But what particular tribunal of that country shall exercise the prize jurisdiction of a particular case, will depend, of course, upon the local laws under which such tribunals are organised, and their respective jurisdictions are assigned and limited. This is entirely a question of local law. So, also, if the captured property is carried into a port of the captor's co-belligerent, it may be adjudicated by a properly constituted prize tribunal of the captor's country; for, although the government of an ally cannot itself condemn, there is nothing to prevent it from permitting the exercise of that final act of hostility on the part of its co-belligerent, the condemnation of property captured in a common war. 'There is a common interest,' says Wheaton, 'between the two governments, and both may

[1] Kent, *Com. on Am. Law*, vol. i. p. 35, § 358; the 'Emulous,' 1 *Gallis. R.*, 563; Phillimore, *On Int. Law*, vol. iii. §§ 126 et seq.; Elphinstone *v.* Bedreechund, *Knapp R.*, 316.

Enemy's property captured by a public vessel, in an enemy's port, although it was, when seized, stored in a warehouse on land near the water, was held, under the facts, to be lawful prize. ('Twelve hundred and fifty-three Bags of Rice,' *Blatchf. Pr. Cas.*, 211.)

It is no legal ground of objection, to the jurisdiction of a prize court, that the arrest was made out of its territorial authority. The court has jurisdiction under the law of nations and by municipal law when the subject matter of the suit is prize of war, without regard to the locality of the arrest or cause of action, and it is unimportant to the question of prize or no prize whether the capturing land and sea forces act in conjunction or separately. Where a combined action exists between vessels of war and land forces in making a capture, it is usually cast upon the latter to prove that their co-operation was direct and positive to authorise their sharing in the prize, and they are not ordinarily recognised as joint captors unless it is proved on their part that the capture was produced by their active interference. The court has cognisance of all captures in an enemy's country made in creeks, havens, and rivers, when made by a naval force solely or in co-operation with land forces. (The two hundred and eighty-two Bales of Cotton, *Blatchf. Pr. Cas.*, 302.)

Slaves cannot be libelled as prize, under the United States Act of June 26, 1812, nor will the District court consider them as prisoners of war, their disposition being exclusively a question of State policy with which the judiciary cannot interfere. (*See* 'Almeida' *v.* Certain Slaves, 5 *Am. Law*, 2 *N. S.*, 459.) Books intended for a public library will not be confiscated in a prize court. (The 'Amelia,' 4 *Phil.*, 417.) For example of the condemnation of an enemy's vessel, in the naval service of the enemy as a gunboat, *see* the 'Ellis,' *Blatchf. Pr. Cas.*, 348.

be presumed to authorise any measures conducing to give effect to their arms, and to consider each other's ports as mutually subservient. Such an adjudication is, therefore, sufficient in regard to property taken in the course of the operations of a common war.' It was at one time supposed that a prize court, though sitting in the country of its own sovereign, or of his ally, had no jurisdiction over prizes lying in a neutral port. Sir William Scott admitted that, on principle, the exercise of such jurisdiction was irregular, as the court wanted that possession which was deemed essential in a proceeding *in rem*; but he considered that the English Admiralty had gone too far in its practice, to be recalled to the original principle. Sir William Grant, in delivering the judgment of the Court of Appeals, in the same case, expressed the same opinion, and the English rule is now considered as definitively settled. The Supreme Court of the United States has followed the English rule, and has held valid the condemnation, by a belligerent court, of prizes carried into a neutral port and remaining there, the practice being justifiable on the ground of convenience to belligerents, as well as neutrals; and though the prize was, in fact, within neutral territory, it was still to be deemed under the control, or *sub potestate*, of the captor, whose possession is considered as that of his sovereign. It may, also, be remarked, that the rule thus established by the highest courts of England and the United States, is sanctioned by the practice of France, Spain, and Holland. But several French publicists deny its legality. For the same reason that a prize court of the captor may condemn captured property while in a neutral port, it may condemn such property situate in any foreign port, which is in the military possession of the captor. 'As a general rule,' says Chief Justice Taney, delivering the opinion of the Supreme Court, 'it is the duty of the captor to bring it within the jurisdiction of the prize court of the nation to which it belongs, and to institute proceedings to have it condemned This is required by the Act of Congress, in cases of capture by ships of war of the United States; and this Act merely enforces the performance of a duty, imposed upon the captor by the law of nations, which, in all civilised countries, secures to the captured a trial in a court of competent jurisdiction, before he can be finally deprived of his property. But there

are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell, or otherwise dispose of, the property, before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel, or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed to adjudication in a court of the United States.'[1]

Decision of competent court conclusive

§ 15. The sentence of a competent prize court of the captor's country is conclusive upon the question of property in the captured thing; it forecloses all controversy respecting the validity of the capture, as between the claimants and the captors of those claiming under them, and terminates all ordinary judicial enquiry upon the subject matter. The captors cannot be held responsible in the court of any other country, nor can the question of the ownership of the captured property be made a matter of judicial investigation when once decided by a competent prize court. A contrary rule, allow-

[1] Wheaton, *Hist. Law of Nations*, p. 321; Jecker et al. *v.* Montgomery, 13 *Howard R.*, 516; the 'Peacock,' 4 *Rob.*, 185; Hudson *v.* Guestier, 4 *Cranch. R.*, 293; Williams et al. *v.* Amroyd, 7 *Cranch R.*, 523; the 'Arabella and Madeira,' 2 *Gallis. R.*, 368; the 'Henric and Maria,' 6 *Rob.*, 138, note; the 'Falcon,' 6 *Rob.*, 198; 'La Dame Cécile,' 6 *Rob.*, 257. It is fully within the usage of the prize courts to entertain and perfect their jurisdiction over property captured on board a vessel, without having the vessel itself brought within their cognisance. In many cases, this is indispensable, as in the case of enemy's property captured in a neutral vessel, or when the enemy's vessel has been destroyed in capture. (The 'Edward Barnard,' *Blatchf. Pr. Cas.*, 123.) A prize court may take judicial cognisance of a capture, without at the time having the prize within its territorial jurisdiction, and without its being brought there, during the pendency of the suit. (The 'Zavalla,' *Blatchf. Pr. Cas.*, 173.) The possession of the captors in a neutral port is the possession of their sovereign, and gives jurisdiction to his courts. (Hudson *v.* Guestier, 4 *Cranch.*, 293.) The jurisdiction of the courts of France as to seizures, is *not* confined to seizures made within two leagues of the coast. (*Ibid.*)

Under *peculiar circumstances*, the English prize court will condemn a prize, which has been taken into and lies in a neutral port, and allow it to be sold there. (The 'Polka,' *Spinks' Prize Cases*, 57.) The right of adjudicating, on all captures and questions of prize, belongs exclusively to the courts of the captor's country; but it is an exception to the general rule that, where the captured vessel is brought, or voluntarily comes *infra præsidia* of a neutral power, that power has a right to enquire whether its own neutrality has been violated by the cruiser which made the capture, and if such violation has been committed, it is in duty bound to restore to the original owner property captured by cruisers, illegally equipped in its ports. (The 'Estrella,' 4 *Wheat.*, 298.)

ing the prize courts of one country to review and reverse the decisions of the prize courts of another country, would lead to great irregularities and endless disputes and litigation. The competency of the court and its jurisdiction may, however, as will be shown hereafter, be made the subject of judicial enquiry.[1]

State responsible for unjust condemnation

§ 16. 'Where the responsibility of the captor ceases,' says Wheaton, 'that of the State begins. It is responsible to other States for the acts of the captors under its commission, the moment these acts are confirmed by the definitive sentence of the tribunals which it has appointed to determine the validity of captures in war.' The sentence of the judge is conclusive against the subjects of the State, but it cannot have the same controlling efficiency toward the subjects of a foreign State. It prevents any further judicial enquiry into the subject matter, but it does not prevent the foreign State from demanding indemnity for the property of its subjects, which may have been unlawfully condemned by the prize

[1] Dalloz, *Répertoire*, verb. 'Prises Maritimes,' § 7; Lothian *v.* Henderson, 3 *B. and P.*, 545; Castrique *v.* Imrie, *L. R.*, 4 *E. and I.*, app., 434–5; Geyer *v.* Aguilar, 7 *T. R.*, 681. Although the decision of a foreign prize court must be received in evidence, still it may be examined, to see whether the fact, in proof of which it is adduced, was clearly and certainly found by the court that gave it, and it is for the court of that nation, in which the decision of the foreign court is quoted, to ascertain what facts were so found, without enquiring into the legal validity of the grounds of the judgment. (Hobb *v.* Fleming, 5 *New R.* (1865), 406. *See* also Hughes *v.* Cornelius, 2 *Show.*, 232; Doe *v.* Oliver, 2 *Sm. L. C.*, 634; Geyer *v.* Aguilar, 7 *T. R.*, 681; and Donaldson *v.* Thompson, 1 *Camp.*, 429.) The sentence of a foreign court of Admiralty is evidence only of what it positively and specifically affirms in the adjudicative part of it, not what may be gathered from it by way of inference. (Fisher *v.* Ogle, 1 *Camp.*, 418; Christie *v.* Secretan, 8 *T. R.*, 192.) Therefore, a condemnation of a vessel, for attempting to violate a blockade, is not conclusive, unless it appear on the face of the sentence, free from doubt, whether the ground of condemnation be a just one by the law of nations, or merely by the municipal regulations of the condemning country. (Dalgleish *v.* Hodgson, 7 *Bing.*, 495.) In Bernardi *v.* Motteux (2 *Dougl. R.*, 581), an action on a policy of insurance, it was held by Lord Mansfield, that a condemnation by a foreign Court of Admiralty is not conclusive evidence that the ship was not neutral, unless it appear that the condemnation went upon that ground. The supposed inconvenience and controversy about the ground of a foreign sentence, would be obviated, if foreign courts would say in their sentences, 'Condemned as enemy's property.' In Baring *v.* Clayett (3 *B. and P.*) it was collected, that the ground of adjudication was the ship being enemy's property, and not the infringement of some positive regulations of the foreign country. The court held such sentence conclusive evidence against a warranty of neutrality. In Lothian *v.* Henderson (*ibid.* 499) the House of Lords held, that a foreign sentence adjudging a ship, for whatever cause, to be enemy's property was conclusive against its neutrality.

court of another nation. 'The institution of these tribunals, so far from exempting, or being intended to exempt, the sovereign of the belligerent nations from responsibility for the acts of his commissioned cruisers, is designed to ascertain and fix that responsibility. Those cruisers are responsible only to the sovereigns whose commissions they bear. So long as seizures are regularly made upon apparent grounds of just suspicion, and followed by prompt adjudication in the usual mode, and until the acts of the captors are confirmed by the sovereign in the sentences of the tribunals appointed by him to adjudicate in matters of prize, the neutral has no ground of complaint, and what he suffers is the inevitable result of the belligerent right of capture. But the moment the decision of the tribunal of the last resort has been pronounced (supposing it not to be warranted by the facts of the case, and by the law of nations applied to those facts), and justice has thus been finally denied, the capture and the condemnation become the acts of the State, for which the sovereign is responsible to the government of the claimant.' Not only may a State demand indemnity for the property of its citizens unlawfully condemned by a foreign prize court, but, if refused, it may resort to reprisals or even to war. The right of redress in this case rests upon the same grounds as the right of redress for injuries received, and a denial of justice persisted in. This principle is supported by the authority of publicists, and by historical examples. If justice is not done to the other claimants by the prize courts of the captors, says Rutherforth, 'they may apply to their own State for a remedy; which may, consistently with the law of nations, give them a remedy, either by solemn war or reprisals. In order to determine when their right to apply to their own State begins, we must enquire when the exclusive right of the other State to judge in this controversy ends. As this exclusive right is nothing else but the right of the State, to which the captor belongs, to examine into the conduct of its members before it becomes answerable for what they have done, such exclusive right cannot end until their conduct has been thoroughly examined. Natural equity will not allow that the State should be answerable for their acts, until those acts are examined by all the ways which the State has appointed for this purpose. Since, therefore, it is usual in maritime

countries to establish not only inferior courts of marine, but likewise superior courts of review, to which the parties may appeal, if they think themselves aggrieved by the inferior courts, the subjects of a neutral State can have no right to apply to their own State for a remedy against an erroneous sentence of an inferior court, till they have appealed to the superior court, or to the several superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the State, to which the captors belong, to examine into their conduct ; and, till their conduct has been examined by all these means, the State's exclusive right of judging continues. After the sentence of the inferior courts has been thus confirmed, the foreign claimants may apply to their own State for a remedy, if they think themselves aggrieved ; but, the law of nations will not entitle them to a remedy, unless they have been actually aggrieved. When the matter has been carried thus far, the two States become the parties to the controversy.'[1]

Cases of England and Prussia in 1753 and of the United States and Denmark in 1830

§ 17. In 1753, the King of Prussia undertook to set up within his own dominions a commission to re-examine the sentences pronounced against his subjects in the British prize courts: this was deemed an innovation upon the settled usage of nations. But, although the British government asserted the proceedings of their prize tribunals to be the only legitimate mode of determining the validity of captures made in war, it did not consider these proceedings as excluding the demand of Prussia for redress upon the government itself. The King even resorted to reprisals, by stopping the interest upon a loan due to British subjects, and secured by hypothecation upon the revenues of Silesia.[2] So, also, under the treaty of 1794, between the United States and Great Britain, a mixed commission was appointed to determine the claim of American citizens, arising from the capture of their property by British cruisers during the existing war with France, and a full satisfactory indemnity was awarded in many cases where there had been a final condemnation by courts of prize. Again, in the negotiation between the Danish and American governments

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 16 ; Rutherforth, *Institutes*, b. ii. ch. ix. § 19.

[2] See as to the Silesian loan vol. i. p. 539.

respecting the captures of American vessels by the cruisers of Denmark during the war between that power and England, it was admitted that, although the jurisdiction of the tribunals of the capturing nation was exclusive and complete, and had the effect of closing for ever all private controversy between the captors and the captured, still, the American government might demand indemnity for unlawful condemnations. The demand which the United States made upon the Danish Government was not for a judicial reversal of the sentences pronounced by its tribunals, but for the indemnity to which the American citizens were entitled, in consequence of the denial of justice by the tribunal in the last resort, and of the responsibility thus incurred by the Danish Government for the acts of its cruisers and tribunal. The Danish Government was, of course, free to adopt any measures it might think proper to satisfy itself of the injustice of those sentences, one of the most natural of which would be a re-examination and discussion of the cases complained of, conducted by an impartial tribunal, under the sanction of the two governments, not for the purpose of disturbing the question of title to the specific property which had been irrevocably condemned, or of reviving the controversy between the individual captors and claimants, which had been for ever terminated, but for the purpose of determining between government and government whether injustice had been done by the tribunals of one power against the citizens of the other, and of determining what indemnity ought to be granted to the latter. There are many other instances where arrangements of this kind have been made between States, for determining and settling claims which arise from the unjust condemnation of prize tribunals.

When jurisdiction may be enquired into

§ 18. We have already stated the general principle that the sentence of a prize court, of competent jurisdiction, *in rem*, is conclusive upon the title to the property condemned. It may be added, that the general presumption is, that the jurisdiction exercised by a foreign tribunal is lawful. But that presumption may be overturned by competent evidence. Where a claim is set up under a sentence of condemnation of a foreign court, every court has a right to examine into the jurisdiction of such foreign court, so far, at least, as to ascertain its competency, in international law, to pronounce the

adjudication. Whenever the jurisdiction cannot, consistently with the laws of nations, be exercised, the sentence will be disregarded. If, therefore, a vessel be condemned under circumstances which show that the court could, under the rules of international law, have no jurisdiction, such sentence will be regarded as a nullity. For instance, a condemnation of a prize, by the consul of the belligerent, in a neutral country, is deemed invalid, because such a jurisdiction cannot be exercised consistently with the law of nations. Moreover, the jurisdiction may be enquired into, not only with respect to the subject matter, but also with respect to the authority from which it has emanated; and if the jurisdiction be unauthorised from either cause, it is a decisive objection to the sentence.[1]

How far governed by municipal laws

§ 19. We have already pointed out the distinction between prize courts and municipal tribunals, with respect to their constitution and character. The same distinction exists with respect to the laws which they administer. Prize courts are in no way bound to regard local ordinances and municipal regulations, unless they are sanctioned by the law of nations. Indeed, if such ordinances and regulations are in contravention of the established rules of international jurisprudence, prize courts must either violate their duty, or entirely disregard them. They are not binding on the prize courts, even of the country by which they are issued. The stipulations of treaties, however, are obligatory upon the nations which have entered into them, and prize courts must observe them in adjudicating between subjects or citizens of the contracting parties. The language of Sir William Scott, in delivering the judgment of the court in the case of the 'Maria,'[2] is peculiarly just and appropiate. 'In forming my judgment, I trust it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls from me; namely, to consider myself as stationed here, not to deliver occasional and shifting opinions, to serve present purposes of particular national interest, but to administer, with indiffer-

[1] Phillips, *On Insurance*, vol. ii. pp. 680 et seq.; Amroyd *v.* Williams, 2 *Wash. R.*, 608; Cherrot *v.* Foussat, 3 *Binn. R.*, 220; Snell *v.* Foussat, 1 *Wash. R.*, 271; Bradstreet *v.* Nep. Ins. Co., 3 *Sumn. R.*, 600; Francis *v.* Ocean Ins. Co., 6 *Cowen R.*, 404; Cuculler *v.* Lou. Ins. Co., 5 *Mart. N. S.*, 464; Ocean Ins. Co. *v.* Francis, 2 *Wend. R.*, 65.

[2] 1 *Rob.*, 340.

ence, that justice which the law of nations holds out, without distinction, to independent States, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations; but the law itself has *no locality*. It is the duty of the person who sits here, to determine this question exactly as he would determine the same question, if sitting at Stockholm; to assert no pretensions on the part of Great Britain, which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain, in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as universal law upon the question.' In speaking of the right of a prize court to adjudicate upon maritime captures, Rutherforth remarks: 'The right which it exercises, is not civil jurisdiction; and the civil law, which is peculiar to its own territory, is not the law by which it ought to proceed. Neither the place where the controversy arose, nor the parties who are concerned in it, are subject to this law. The only law by which this controversy can be determined, is the law of nature, applied to the collective bodies of civil societies, that is, *the law of nations*; unless, indeed, there have been any particular treaties made between the two States, to which the captors and the other claimants belong, mutually binding them to depart from such rights as the law of nations would otherwise have supported. Where such treaties have been made, they are a law to the two States, as far as they extend, and to all the members of them in their intercourse with one another. The State, therefore, to which the captors belong, in determining what might or what might not be lawfully taken, is to judge by these particular treaties, and by the law of nations taken together.'

Character of proceedings

§ 20. 'No proceedings,' says Mr. Justice Story, 'can be more unlike than those in the courts of Common Law and in Admiralty. In prize courts, in an especial manner, the allegations, the proofs, and the proceedings, are, in general, modelled upon the civil law, with such additions and alterations as the practice of nations and the rights of belligerents and neutrals unavoidably impose.' The parties in a prize

case are, therefore, not limited in their recovery, *secundum allegata et probata*, as in the case of a declaration at common law; but the court having jurisdiction over the property, exerts its authority over all the incidents, and will shape its decree as the circumstances of the case may require. After the first hearing of the cause, orders are made for further proof, not only in the court below, but also in the appellate court. Not only the proceedings, but also the rules of evidence, are, in many respects, different from those of courts of common law; and prize courts not only decide upon the claims of the captors, but also upon their conduct in making the capture, and subsequently, and not unfrequently, declare a forfeiture of their rights, with vindictive damages. We subjoin a digest of some of the decisions of the Supreme Court of the United States on proceedings in prize cases, and the duties and liabilities of captors. In prize causes, the evidence to acquit or condemn, must come, in the first instance, from the papers and crew of the captured ship. It is the duty of the captors to bring the ship's papers into the registry of the district court, verify them on oath, and to have the examinations of the principal officers and seamen of the captured ship taken on the standing interrogatories, and not *vivâ voce*. It is exclusively upon these papers and examinations that the cause is to be heard in the first instance. If, from this evidence, the property clearly appears to be hostile or neutral, condemnation or restitution immediately follows. If the property appears to be doubtful, or the case suspicious, further proof may be granted according to the rules which govern the legal discretion of the court, if the claimant has not forfeited his right to it by a breach of good faith. The Supreme Court hears the cause, in the first instance, upon the evidence transmitted from the Circuit court, and decides upon that, whether it is proper to allow further proof. If the court below has denied an order for further proof, when it ought to have been granted, or has allowed it, when it ought to have been denied, and the objection was made by the party, and appears on the record, the appellate court can administer the proper relief. Where the national character does not distinctly appear, or where the question of proprietary interest is left in doubt, further proof is usually ordered. If the parties have had the benefit of plenary proof in the court

below, an order for further proof[1] is not allowed by the appellate court, except under very special circumstances. If there is reason to believe that the applicant has suppressed important documentary evidence, or that the parties have been guilty of gross fraud, or misconduct, or illegality, further proof is not allowed. Further proof by the claimant, inconsistent with that already in the case, is refused. Where an order for further proof is made, and a party neglects to comply with it, courts of prize are in the habit of considering such negligence as fatal to his claim. The concealment or spoliation of papers by an enemy master carrying a cargo chiefly hostile, does not thereby preclude a neutral claimant, to whom no fraud is imputable, from further proof. The circumstances of goods being found on board an enemy's ship, raises, in general, a legal presumption that they are enemy's property, and the *onus probandi* of a neutral interest rests on the claimant. Affidavits, to be used as a further proof, must be taken under a commission. Depositions taken on further proof, in one prize cause, cannot be invoked in another. Where the affidavits produced as further proof are positive, but their credibility impaired by the non-production of letters

[1] A vessel, under Greek colours, was captured in the offing of Odessa in 1855, by an English ship of war, while attempting to enter that port, then declared to be in a state of blockade. A claim for her restitution was founded on the necessity of her attempting that port, by reason of her leaky condition. It appeared that the claimant was not in reality her owner. Further proof was allowed by the English prize court, both for the claimant and the captors—the one to prove, the other to disprove, that the intention to enter the blockaded port arose from 'imperious and overwhelming necessity.' The claim was also allowed to be amended, so as to show who was the real owner. (The 'Panagia Rhomba,' 3 *Jur. N. S.*, 23.) Both parties were allowed to give further proof, as to the intention to violate blockade, in the case of the 'Jane Campbell,' *Blatchf. Pr. Cas.*, 101. A claimant forfeits the right to ask to take further proof, by any guilty concealments previously made in the case. (The 'Grey Jacket,' 5 *Wall.*, 342.) It is the ordinary course of prize courts, upon an order for further proof, especially when it becomes material to ascertain the circumstances of the capture, to allow the attestations of the captors as evidence; for in such cases the fact lies as much within the knowledge of the captors as the captured, and the objection of interest generally applies as strongly to the one party as to the other. (The 'Anne,' 3 *Wheat.*, 435.)

It is enacted by 27 and 28 Vict., c. 25, s. 21, that 'where, on production of the preparatory examinations and ship papers, it appears to the court doubtful whether the captured ship is good prize or not, the court may direct *further proof* to be adduced, either by affidavit or by examination of witnesses, with or without pleadings, or by production of further documents, and on such further proof being adduced, the court shall with all convenient speed proceed to adjudication.'

mentioned therein, a second order for further proof will be allowed in the appellate court.[1]

Custody of property

§ 21. A vessel libelled as prize is in the custody of law and under the control of the court. The prize court in which proceedings were instituted has power to order a sale, even after an appeal; and although such sale, after an appeal, is irregular, this irregularity will not render the captors liable to pay the amount of the sales, which did not come into their hands, but were under the control of the court. A sale made before condemnation, by one acting under the possession of the captor, does not divest the prize court of its jurisdiction, to decide the question of prize, and the subsequent condemnation relates back to the capture, affirms its legality, and establishes the title of the purchaser. In the United States a

[1] The 'Dos Hermanos,' 2 *Wheat. R.*, 76; the 'Pizarro,' 2 *Wheat. R.*, 227; the 'Amiable Isabella,' 6 *Wheat. R.*, 1; the 'London Packet,' 2 *Wheat. R.*, 371; schooner 'Adeline' and cargo, 9 *Cranch. R.*, 244; the 'Venus,' 5 *Wheat. R.*, 127; the 'Atalanta,' 5 *Wheat. R.*, 433; the 'Fortuna,' 3 *Wheat. R.*, 236; the Euphrates,' 8 *Cranch. R.*, 385; the 'Experiment,' 4 *Wheat. R.*, 84. The common law doctrines, as to the competency of witnesses, are not applicable to prize proceedings. No person is incompetent in those courts, merely on the ground of interest. His testimony is admissible, subject to all exceptions as to its credibility. (The 'Anne,' 3 *Wheat.*, 435.) The rule that the testimony, for the condemnation of a prize, must be obtained, in the first instance, directly from documents or witnesses found on board the vessel at the time of her seizure, is always adhered to, unless satisfactory reasons are shown for departing from it in a particular instance. (The 'Zavalla,' *Blatchf. Pr. Cas.*, 173; the 'Jane Campbell,' *ibid.* 101.) Where all the persons on board escaped before the capture of a vessel, and the capture was made while she was attempting to violate a blockade, it was held that, upon satisfactory proof that the vessel and cargo were enemy's property, a decree might be entered against them in the absence of an examination of the papers and crew. (The 'Gipsy,' *Blatchf. Pr. Cas.*, 126.) A vessel, after her capture, was appropriated to the use of the United States, and was not sent into port. Her cargo was sent in by another vessel, and was arrested in the suit. None of her company were sent in as witnesses. A person present at the capture was, by order of the court, examined as a witness, and the cargo condemned; but the vessel was discharged for want of legal arrest and prosecution. (The 'Wave,' *Blatchf. Pr. Cas.*, 329.) Where none of the officers or crew of the vessel were sent into port with her, or produced with her to be examined as witnesses, it was held, that the subsequent appearance and examination *in preparatorio* of the master cured the irregularity. (The 'Henry Middleton,' *Blatchf. Pr. Cas.*, 121.) A vessel and cargo were condemned as enemy's property, upon proof of the spoliation of papers at the moment of capture, and that a former enemy owner remained in possession as master of the vessel for a year, through two alleged sales to neutrals, and alleged neutral owners, who resided near the place where the vessel and cargo were libelled, leaving the whole defence to such former owner. (The 'Andromeda,' 2 *Wall.*, 481.)

warrant immediately goes to the marshal to take possession of the property, and he is bound to keep it *in salvâ et arctâ custodiâ*; and if any loss happen by his negligence he is responsible for it to the court. In England, it formerly actually remained in the custody of the court, and does so now in contemplation of law, although the Admiralty, merely for convenience, allow the captors to retain the possession in England, but as the agents of the court, and not in the right of property. And the court still retains its custody, notwithstanding an unlivery and deposit in public warehouses.[1]

Conduct of suit by captors

§ 22. As has already been remarked, it is the duty of the captors to send their prize into a convenient port of their own country, and to immediately bring the case before the proper court for adjudication. If they fail to do this, the claimant may apply to the court for a monition to the captors to proceed forthwith for adjudication, and if they neglect to do so after service and return of such monition, the court will, if a proper case be laid before it, proceed to award not only restitution, but also damages and costs. Even if the captors agree to a restitution, if they have unreasonably delayed to make it, demurrage will be allowed against them. The libel filed by the captors is usually in very general terms, setting forth the facts of the capture, and alleging the captured property to be a subject of prize rights; but the captors are not required at the commencement of the suit to allege the particular grounds upon which they base their claim to a condemnation. But

[1] Smart *v.* Wolff, 3 *Durn. and East.*, 323, 329; the 'Herkimer,' *Stewart R.*, 128; the 'Rendsberg,' 6 *Rob.*, 142; the 'Concord,' 9 *Cranch. R.*, 387; the 'Nereide,' 1 *Wheat. R.*, 171; the 'Hoop,' 4 *Rob.*, 145. Application for a sale of prize property, before hearing, on the ground that it was in a perishing condition, granted, under the circumstances of the case. (Stoddart *v.* Read, 2 *Dall.*, 40; the 'Pioneer,' *Blatchf. Pr. Cas.*, 61.) On a motion, for the sale of a cargo pending the hearing, on the ground that it is in a perishing condition, the judgment of the prize commissioners, founded on their inspection, as evidenced by their report, will prevail, unless controlling evidence is produced counteracting their judgment. (The 'Nassau,' *Blatchf. Pr. Cas.*, 198.) The application for the sale of prize property, in a perishing condition, was refused in the case of the 'Alliance,' *Blatchf. Pr. Cas.*, 186; compare Harlan *v.* the 'Nassau,' *ibid.* 220. A sale of prize property was allowed before a hearing, under the circumstances of the case, of the 'Sarah and Caroline,' *Blatchf. Pr. Cas.*, 123; and of the 'Nymph,' *ibid.* 564. A libel, in a prize case, need contain no further averment than that the property seized is prize of war. (The 'Sally Magee,' *Blatchf. Pr. Cas.*, 382.) When a sale will be ordered, pending an appeal, *see* the 'Crenshaw,' *Blatchf. Pr. Cas.*, 631; the 'Hiawatha,' *ibid.* 632; the 'Sunbeam,' *ibid.* 638.

the court may, in its discretion, afterwards order special pleadings. In case of joint captures, the libel is filed by the actual seizors, and those claiming the benefit of joint capture afterwards file their claim, giving bonds to the required amount for costs. On the filing of the libel, the usual practice is to issue a monition, citing all persons who are interested to appear by a given day, and show cause why the specified property should not be condemned as prize, &c.[1] The rules governing prize courts are set out in the appendix to this chapter.

[1] The 'Betsey,' 1 *Rob.*, 93; the 'Mentor,' 1 *Rob.*, 181; the 'Huldah,' 3 *Rob.*, 239; the 'Der Mohr,' 3 *Rob.*, 129; the 'George,' 3 *Rob.*, 212; the 'William,' 4 *Rob.*, 215; the 'Susanna,' 6 *Rob.*, 48; the 'Adeline,' 9 *Cranch.*, 244; the 'Fortuna,' 1 *Dod. R.*, 81; the 'Conqueror,' 2 *Rob.*, 303.

Goods are usually condemned, for want of a claim, after a year and a day have elapsed from the date of the return of the monition. During the Crimean war, 1854, this time was reduced to three months by the 17 and 18 Vict., c. 18, s. 37, liberty being reserved to the Judicial Committee to allow the appeal to be prosecuted after the expiration of that period. But the motion by a claimant, the owner of a cargo, upon notice to the captor for leave to appeal from a sentence of the Admiralty Court in England, pronounced *in pœnam contumaciæ*, fifteen months after the capture, was granted subject to the presentment of a petition of leave to appeal, on payment of costs, and on the terms of prosecuting the appeal within three months, bail being given for payment of the captor's costs. The proceedings in England were unknown to the owner of the cargo, and the sentence of condemnation not having been communicated by the captors to the owner, he had no knowledge thereof, until long after the time for appealing had expired. (The 'Aspasia,' 11 *Moore P. C. C.*, 80. *See* also the 'Achilles,' 11 *ibid.* 86.)

It is enacted by the 27 and 28 Vict., cap. 25, s. 36, that 'before condemnation, a petition on behalf of asserted joint captors shall not (except by special leave of the court) be admitted, unless and until they give security, to the satisfaction of the court, to contribute to the actual captors a just proportion of any costs, charges, expenses, or damages that may be incurred by, or awarded against, the actual captors on account of the capture and detention of the prize. After condemnation, such a petition shall not (except by special leave of the court) be admitted, unless and until the asserted joint captors pay to the actual captors a just proportion of the costs, charges, and expenses incurred by the actual captors in the case, and give such security as aforesaid, and show sufficient cause to the court why their petition was not presented before condemnation.' Then follows an exception with regard to flag officers.

A British prize court, 'on proof of any offence against the law of nations or against this Act, or any Act relating to naval discipline, or against any Order in Council or Royal Proclamation, or of any breach of her Majesty's instructions relating to prize, or of any Act of disobedience to the orders of the Lords of the Admiralty, or to the command of a superior officer, committed by the captors in relation to any ship or goods taken as prize, or in relation to any person on board any such ship, may on condemnation reserve the prize to her Majesty's disposal, notwithstanding any grant that may have been made by her Majesty in favour of captors.' (27 and 28 Vict., cap. 25, s. 37.)

The practice in American prize courts is, in general, to make final con-

Who may appear as claimants

§ 23. As a general rule, the subject of the enemy cannot appear as a claimant, for he has no *persona standi* in the court. But if the captured vessel was sailing under a cartel, or flag of truce, and was captured by mistake or under circumstances of suspicion, it is considered to form an exception to this rule, and the enemy master is allowed to appear and claim restitution. A party to be entitled to assert a claim in a prize court must be the general owner of the property; a person who has a mere lien on the property for a debt, whether liquidated or unliquidated, is not entitled to assert his claim; nor can the mortgagee assert any claim, where the mortgagor has been left in possession. An appearance by a proctor for the claimants, duly entered, cures all defects of process, such as the want of monition or of due notice. And, even assuming that one partner has no authority to appoint a proctor for all the parties, yet a general appearance for all by a proctor is good and legally binding. A claim must be made by the parties interested, if present, or, in their absence, by the master of the ship, or some agent of the owners. A mere stranger will not be permitted to interpose a claim merely to speculate on the chances of an acquittal.[1]

demnation of enemy's property at the hearing of the cause, upon the ship's papers and the evidence *in preparatorio*. The suspension of proceedings for a year and a day, after a default, is allowed only in cases where it is doubtful upon the evidence, whether the captured property belong to the enemy or is neutral. (The 'Falcon,' *Blatchf. Pr. Cas.*, 52.)

The rule of the prize courts, to allow a year and a day in case of neutral vessels, for claimants to appear, is not a vested right in neutrals. It is allowed as of right, where the condemnation, if decreed, must be solely on the ground of default. If the captors show a clear case of enemy property, or of contraband, or of breach of blockade, the court may condemn the vessel or cargo, although they are under neutral flag and papers, in the absence of claimants, without waiting a year and a day. So if it shall be proved, that the neutral owners have had notice and opportunity to appear, condemnation may go at once, solely on the ground of default, and the presumptions arising therefrom, without other proof. (The 'Julia,' 2 *Sprague*, 164.) As to what order may be made, where the libellants in a prize cause are chargeable with wrongful delay in the prosecution of the cause, *see* Jecker *v.* Montgomery, 13 *How.*, 498; the 'Springbock,' *Blatchf. Pr. Cas.*, 349.

[1] The 'Falcon,' 6 *Rob.*, 199; the 'Daifjie,' 3 *Rob.*, 143; the 'Mary,' 5 *Rob.*, 199; the 'Eenrom,' 2 *Rob.*, 1; the 'Tobago,' 5 *Rob.*, 218; the 'Frances,' 8 *Cranch. R.*, 355; the 'Marianna,' 6 *Rob.*, 24; Balch *v.* Darrel, *Bees R.*, 74; Penhallow *v.* Doane, 2 *Dallas R.*, 54; Hills *v.* Ross, 3 *Dallas R.*, 231.

Whether a maritime lien for work and materials, alleged to have been furnished to a vessel prior to her capture *jure belli*, is lost by such capture, is a proper subject for investigation and decision by the prize court, before

Duties of claimants

§ 24. A claimant who wishes to procure the restitution of any property captured as prize, must after the libel is filed, and at or before the return of the monition thereon, or within the time assigned by the court, enter his claim for such property, accompanied with an affidavit, stating briefly the facts respecting the claim and its verity. If the parties themselves are not within the jurisdiction of the court, or at a very great distance, the claim may be sworn to by an agent. Before the claim duly sworn to is put in, the claimants are not, as a general rule, permitted to examine the ship's papers, as this might lead to great abuses, but sometimes, on special application, the court will permit so many of the papers to be examined as it may deem proper, in order to enable the claimant to set forth the particular grounds of his claim. The pleadings both on the part of the captors and claimants are of a very simple character, formed upon the rules and practice of the Roman law. Both the libel and claim are of a general character, *special allegations* of particular circumstances not being usually made. With respect to the reception of evidence, courts allow every relaxation of technical rules which are permitted to prevail in the country in which it is taken. As a general rule no claim is admitted which stands in entire opposition to the ship's papers and to the preparatory examinations. Nor can any person be permitted to claim in a prize where the trans-

which the captured vessel is brought for adjudication, and which the parties setting up such lien can, on proper presentation of their claim to that tribunal, have decided. But if such parties do not so present, and ask to have it decided, the question is not properly before the Supreme Court for review, in a case where the District court only dismissed the libel, as improperly filed on its instance side. (The 'Nassau,' 4 *Wall.*, 634; Harlan *v.* the 'Nassau,' *Blatchf. Pr. Cas.*, 220.) A mortgagee of captured property has no right to assert his mortgage in a prize court, and demand its payment out of the proceeds of the property, if condemned. All liens upon captured property, which are not in their very nature open and apparent, like that for freight upon the cargo laden on board a captured vessel, are utterly disregarded by prize courts. (The 'Delta,' *Blatchf. Pr. Cas.*, 133.) In proceedings in prize, and under principles of international law, mortgages on vessels captured *jure belli* are to be treated only as liens, subject to being overridden by the capture; not as *jura in re*, capable of an enforcement superior to the claims of the captors. (The 'Hampton,' 5 *Wall.*, 372.) Demands, against property captured as prize of war, must be adjusted in a prize court. The property arrested as prize, is not attachable at the suit of private parties. If such parties have claims, which, in their view, override the rights of captors, they must present them to the prize court for settlement. (The 'Nassau,' 4 *Wall.*, 634; Harlan *v.* the 'Nassau,' *Blatchf. Pr. Cas.*, 220.)

action in which he is engaged is in violation of the municipal law of his own country, or of that where the court is sitting. Claimants must give bonds for costs and expenses to the amount required by statute or the rules of the court.[1]

Nature and form of decrees

§ 25. When a sentence is pronounced either of acquittal or condemnation, it is generally, in the English prize court, by an *interlocutory decree*, but in the United States it is the more common practice to reserve a decree until a final decision of all the questions before the court. Decrees of *acquittal* may be either with or without damages and costs, or on condition of paying costs and expenses. If the specific property remains in the custody of the court and *restitution* is decreed, it is directed to be delivered to the claimant; but if disposed of the proceeds are so delivered. In case of *condemnation* in favour of a privateer, it is usual in England to deliver a decree, with a proper commission to the master of the privateer to make sale of the prize and return an account to the court; but in the United States all sales before and after condemnation are made by the marshal, who returns the funds to the court to be distributed by its order.[2]

[1] The 'Port Mary,' 3 *Rob.*, 233; the 'La Flora,' 6 *Rob.*, 1; the 'Walsingham Packet,' 2 *Rob.*, 77; the 'Etrusco,' 4 *Rob.*, 262; the 'Cornelis and Maria,' 4 *Rob.*, 23; the 'Peacock,' 4 *Rob.*, 185; the 'Arabella and Madeira,' 2 *Gallis. R.*, 368.

It is not competent for a neutral consul, without the special authority of his government, to interpose a claim in a case of prize, on account of a violation of the territorial jurisdiction of his country in the capture. (Supreme Ct., 1818, the 'Anne,' 3 *Wheat.*, 435.) Where, after condemnation of a vessel and cargo, the decree as to the vessel was opened by consent on the application of the owners of the vessel, who showed that she had been previously captured from them by a privateer of the enemy —Held, that the vessel should be restored, on payment of one-eighth of her value as salvage to the captors. (The 'Hattie,' *Blatchf. Pr. Cas.*, 579.) Cargo on board enemy's vessel, being neutral property on transportation in a lawful trade, released without costs to the captors, there having been no probable cause for its arrest. (The 'Velasco,' *Blatchf. Pr. Cas.*, 54.) Where there was probable cause for the seizure, but the vessel was neutral property, on a lawful voyage, and was making for a blockaded port for repairs, she was restored to the claimants without costs. (The 'Jane Campbell,' *Blatchf. Pr. Cas.*, 101.) Instances of the vessel and cargo released and restored to the claimants upon the facts in the case. (*See* the 'Tropic Wind,' *Blatchf. Pr. Cas.*, 64; the 'Labuan,' *ibid.* 165; the 'Glen,' *ibid.* 375; the 'Sybil,' *ibid.* 615; the 'Sarah M. Newhall,' *ibid.* 629; the 'Argonaut,' *ibid.* 62; the 'Hannah M. Johnson,' *ibid.* 2; the 'Forest King,' *ibid.* 2; the 'Gondar,' *ibid.* 649, 669; reversing S. C., *ibid.* 266; the 'Science,' 5 *Wall.*, 178; the 'Teresita,' *ibib.* 181; the 'Volant,' *ibid.* 179.)

[2] Phillimore, *On Int. Law*, vol. iii. §§ 493–497; *Marriott's Forms*, pp. 194, 196. The master of an enemy's vessel condemned as prize is

APPENDIX.

PROCEEDINGS IN BRITISH PRIZE COURTS.

The following opinion, on the general principles of proceeding in prize courts, was drawn up in the form of a letter to Mr. Jay, on the behalf and at the request of the Government of the United States, by Sir W. Scott and Sir J. Nichol, in 1794, as follows :— Proceedings in British prize courts

'We have the honour of transmitting, agreeably to your Excellency's request, a statement of the general principles of proceeding in prize causes, in British courts of Admiralty, and of the measures proper to be taken when a ship and cargo are brought in as prize within their jurisdiction.

'The general principles of proceeding cannot, in our judgment, be stated more correctly or succinctly than we find them laid down in the following extract from a report made to his late Majesty in the year 1753, by Sir G. Lee, then judge of the Prerogative Court, Dr. Paul, his Majesty's Advocate-General, Sir D. Rider, his Majesty's Attorney-General, and Mr. Murray (afterwards Lord Mansfield), his Majesty's Solicitor-General :—

'"When two powers are at war, they have a right to make prizes of the ships, goods, and effects of each other, upon the high seas. Whatever is the property of the enemy, may be acquired by capture at sea ; but the property of a friend cannot be taken, provided he observes his neutrality.

'"Hence the law of nations has established—

'"That the goods of an enemy, on board the ship of a friend, may be taken ;

'"That the lawful goods of a friend, on board the ship of an enemy, ought to be restored ;

'"That contraband goods, going to the enemy, though the property of a friend, may be taken as prizes ; because supplying the enemy with what enables him better to carry on the war, is a departure from neutrality.

'"By the maritime law of nations, universally and immemorially received, there is an established method of determination, whether the capture be, or be not, lawful prize.

'"Before the ship, or goods, can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize, in a court of Admiralty, judging by the law of nations and treaties.

'"The proper and regular court for these condemnations is the court of that State to whom the captor belongs.

'"The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken—viz. the papers on board, and the examination on oath of the master, and other principal officers ; for which purpose there are officers of Admiralty in all the considerable sea ports of every maritime power at war, to examine the captains, and other principal officers of every ship, brought in as a prize, upon general and impartial interrogatories : if there do not appear from thence ground to condemn, as enemy's property, or contraband goods going to the enemy, there must be an acquittal, unless from the aforesaid evidence

not entitled to be repaid out of the proceeds of the vessel, for disbursements made by him for her use. (The 'Velasco,' *Blatchf. Pr. Cas.*, 54.) Prize cargoes sent in for adjudication in a transport chartered by the government, are not chargeable with the payment of freight or any part of the vessel. (The 'Undaunted,' 2 *Sprague*, 194.)

the property shall appear so doubtful, that it is reasonable to go into further proof thereof.

'"A claim of ship, or goods, must be supported by the oath of somebody, at least as to belief.

'"The law of nations requires good faith: therefore every ship must be provided with complete and genuine papers; and the master, at least, should be privy to the truth of the transaction.

'"To enforce these rules, if there be false or colourable papers; if any papers be thrown overboard; if the master and officers examined *in preparatorio* grossly prevaricate; if proper ship's papers are not on board; or if the master and crew cannot say, whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehaviour, or suspicion, arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant, in case of acquittal and restitution: on the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages. For which purpose all privateers are obliged to give security for their good behaviour; and this is referred to, and expressly stipulated by many treaties.

'"Though from the ship's papers, and the preparatory examinations, the property does not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits, to supply that defect; if he will not show the property by sufficient affidavits, to be neutral, it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship, the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly entitled to receive his costs.

'"If the sentence of the court of Admiralty is thought to be erroneous, there is in every maritime country a superior court of review, consisting of the most considerable persons, to which the parties who think themselves aggrieved may appeal; and this superior court judges by the same rule which governs the court of Admiralty—viz. the law of nations, and the treaties subsisting with that neutral power, whose subject is a party before them.

'"If no appeal is offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

'"This manner of trial and adjudication is supported, alluded to, and enforced, by many treaties.

'"In this method, all captures at sea were tried, during the last war, by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method, by courts of Admiralty acting according to the law of nations and particular treaties, all captures at sea have immemorially been judged of, in every country in Europe. Any other method of trial would be manifestly unjust, absurd, and impracticable."

'Such are the principles which govern the proceedings of the prize courts.

'The following are the measures which ought to be taken by the captor, and by the neutral claimant, upon a ship and cargo being brought in as a prize. The captor immediately, upon bringing his prize into port, sends up, or delivers upon oath, to the registry of the court of Admiralty, all papers found on board the captured ship. In the course of a few days, the examinations *in preparatorio* of the captain and some of the crew of the captured ship are taken, upon a set of standing interrogatories, before the commissioners of the port to which the prize is brought, and which are also forwarded to the registry of the Admiralty as soon as taken. A monition is extracted by the captor from the registry, and served upon the Royal Exchange, notifying the capture, and calling upon all persons interested to appear and show cause, why the ship and goods should not

be condemned. At the expiration of twenty days, the monition is returned into the registry, with a certificate of its service, and if any claim has been given, the cause is then ready for hearing, upon the evidence arising out of the ship's papers, and preparatory examinations.

'The measures taken, on the part of the neutral master or proprietor of the cargo, are as follows: Upon being brought into port, the master usually makes a protest, which he forwards to London, as instructions (or with such further directions as he thinks proper) either to the correspondent of his owners, or to the consul of his nation, in order to claim the ship and such parts of the cargo as belong to his owners, or with which he was particularly entrusted; or the master himself, as soon as he has undergone his examination, goes to London to take the necessary steps.

'The master, correspondent, or consul, applies to a proctor, who prepares a claim supported by an affidavit of the claimant, stating briefly to whom, as he believes, the ship and goods claimed belong, and that no enemy has any right or interest in them. Security must be given to the amount of sixty pounds to answer costs, if the case should appear so grossly fraudulent on the part of the claimant as to subject him to be condemned therein. If the captor has neglected in the meantime to take the usual steps (but which seldom happens, as he is strictly enjoined both by his instructions, and by the Prize Act, to proceed immediately to adjudication), a process issues against him on the application of the claimant's proctor, to bring in the ship's papers and preparatory examinations, and to proceed in the usual way.

'As soon as the claim is given, copies of the ship's papers and examinations are procured from the registry, and upon the return of the monition the cause may be heard. It, however, seldom happens (owing to the great pressure of business, especially at the commencement of a war) that causes can possibly be prepared for hearing immediately upon the expiration of the time for the return of the monition; in that case, each cause must necessarily take its regular turn. Correspondent measures must be taken by the neutral master, if carried within the jurisdiction of a Vice-Admiralty court, by giving a claim supported by his affidavit, and offering security for costs, if the claim should be pronounced grossly fraudulent.

'If the claimant be dissatisfied with the sentence, his proctor enters an appeal in the registry of the court where the sentence was given, or before a notary public (which regularly should be entered within fourteen days after the sentence), and he afterwards applies at the registry of the Lords of Appeal in prize causes, which is held at the same place as the registry of the High Court of Admiralty, for an instrument called an inhibition, and which should be taken out within three months, if the sentence be in the High Court of Admiralty, and within nine months if in a Vice-Admiralty court; but may be taken out at later periods, if a reasonable cause can be assigned for the delay that has intervened. This instrument directs the judge whose sentence is appealed from, to proceed no further in the cause; directs the registrar to transmit a copy of all the proceedings of the inferior court; and it directs the party who has obtained the sentence to appear before the superior tribunal to answer to the appeal. On applying for this inhibition, security is given on the part of the appellant to the amount of two hundred pounds to answer costs, in case it should appear to the Court of Appeal that the appeal is merely vexatious. The inhibition is to be served upon the judge, the registrar, and the adverse party and his proctor, by showing the instrument under seal, and delivering a note or copy of the contents. If the party cannot be found, and the proctor will not accept the service, the instrument is to be served *viis et modis*—that is, by affixing it to the door of the last place of residence, or by hanging it up on the pillars of the Royal Exchange.

'That part of the process above described, which is to be executed

abroad, may be performed by any person to whom it is committed, and the formal part at home is executed by the officer of the court. A certificate of the service is endorsed upon the back of the instrument, sworn before a surrogate of the superior court, or before a notary public, if the service is abroad.

'If the cause be adjudged in a Vice-Admiralty court, it is usual, upon entering an appeal there, to procure a copy of the proceedings, which the appellant sends over to his correspondent in England, who carries it to a proctor; and the same steps are taken to procure and serve the inhibition as where the cause has been adjudged in the High Court of Admiralty. But if a copy of the proceedings cannot be procured in due time, an inhibition may be obtained by sending over a copy of the instrument of appeal, or by writing to the correspondent an account only of the time and substance of the sentence.

'Upon an appeal, fresh evidence may be introduced, if upon hearing the cause the Lords of Appeal shall be of opinion that the case is of such doubt as that further proof ought to have been ordered by the court below. Further proof usually consists of affidavits made by the asserted proprietors of the goods, in which they are sometimes joined by their clerks and others acquainted with the transaction, and with the real property of the goods claimed. In corroboration of these, affidavits may be annexed, original correspondence, duplicates of bills of lading, invoices, extracts from books, &c. These papers must be proved by the affidavits of persons who can speak to their authenticity; and if copies or extracts, they should be collated and certified by public notaries. The affidavits are sworn before the magistrates, or others competent to administer oaths in the country where they are made, and authenticated by a certificate from the British Consul.

'The degree of proof to be required depends upon the degree of suspicion and doubt that belongs to the case. In cases of heavy suspicion and great importance, the court may order what is called "plea and proof"—that is, instead of admitting affidavits and documents, introduced by the claimant only, each party is at liberty to allege in regular pleadings such circumstances as may tend to acquit or to condemn the capture, and to examine witnesses in support of the allegations to whom the adverse party may administer interrogatories. The depositions of the witnesses are taken in writing. If the witnesses are to be examined abroad, a commission issues for that purpose; but in no case is it necessary for them to come to England. These solemn proceedings are not often resorted to.

'Standing commissions may be sent to America, for the general purpose of receiving examinations of witnesses in all cases where the court may find it necessary, for the purposes of justice, to decree an enquiry to be conducted in that manner.

'With respect to captures and condemnations at Martinico, which are the subjects of another enquiry contained in your note, we can only answer in general, that we are not informed of the particulars of such captures and condemnations; but as we know of no legal court of Admiralty established at Martinico, we are clearly of opinion that the legality of any prizes taken there must be tried in the High Court of Admiralty of England upon claims given in the manner above described, by such persons as may think themselves aggrieved by the said captures.'

PRACTICE IN PRIZE COURTS.

[This was written in 1816, and is extracted from Wheaton's 'Reports,' vol. i. note ii. p. 494. It was, in fact, written by Judge Story, as appears from the 'Life of Judge Story,' by his son (London, Chapman, 1851).]

Practice in prize courts

As soon as a vessel or other thing captured as a prize arrives in our ports, notice should be given thereof by the captors to the district judge, or to the commissioners appointed by him, that the examinations of the captured crew, who are brought in, may be regularly taken in writing, upon oath, in answer to the standing interrogatories. These are usually prepared under the direction of the district judge, and should contain sifting enquiries upon all points which can affect the question of prize. The standing interrogatories used in the English High Courts of Admiralty (1 *Rob.*, 381) have been drawn up with great care, precision, and accuracy, and are an excellent model for other courts. They were generally adopted during the late war by the district judges in the principal States, with a few additions and scarcely any variations. The examinations upon these interrogatories are rarely taken by the district judge in person; for, in almost all the principal ports within his district, he appoints standing commissioners for prize proceedings, upon whom this duty devolves. It is also the duty of the prize master to deliver up to the district judge or commissioner all the papers and documents found on board, and, at the same time, to make an affidavit that they are delivered up as taken, without fraud, addition, subduction, or embezzlement. In general, the master and principal officers and some of the crew of the captured vessel should be brought in for examination. This is a settled rule of the prize courts, and was, during the late war, enforced by the special instructions of the President. The examination must be confined to persons on board at the time of the capture, unless the special permission of the court is obtained for the examinations of others (6 *Rob.*, 185, the 'Eliza and Katy;' 4 *Rob.*, 43, 57, the 'Henrick and Maria'). In order to guard as much as possible against frauds and misstatements from after contrivances, the examination should take place as soon as possible after the arrival of the vessel, and the witnesses are not allowed to have communication with, or to be instructed by, counsel. The captors should also introduce all their witnesses in succession; for if the commissioners have taken the depositions of some of the crew, and transmitted them to the judge, they will not be at liberty, without a special order, to examine others who are afterwards brought by the captors before them (2 *Rob.*, 243, the 'Speculation'). On the other hand, an equal strictness is held over the conduct of the claimants. If they keep back any one of the captured crew for two or three days after the vessel comes into port, and then offer him, together with papers in his possession, the commissioners will be justified in not examining him (1 *Rob.*, 331; and *see* 4 *Rob.*, 381, the 'William and Mary'). The ship's papers and other documents found on board, which are not delivered up to the district judge, or the commissioners, before, or at the time of, the examinations, will not be admitted as evidence (*ibid.*)

Although the examinations are to be on standing interrogatories, without the instruction of counsel, yet the witnesses are produced in the presence of the agents of the parties, before the commissioners, whose duty it is to superintend the regularity of the proceedings, and protect the witnesses from surprise or misrepresentation. Where the deposition is taken, each sheet is afterwards read over to the witness, and separately signed by him (5 *Rob.*, 286, the 'Apollo'). And the commissioners should be careful that the various answers are taken fully and perfectly, so as to

meet the stress of every question, and should not suffer the witness to evade a sifting enquiry by vague and obscure statements. If the witness refuse to answer at all, or to answer fully, the commissioners are to certify the fact to the court; and, in addition to the other penal consequences to the owners of the ship and cargo from a suppression of evidence, he will be liable to close imprisonment for the contempt. The witnesses should be examined separately, and not in presence of each other, so as to prevent any fraudulent concert between them.

As soon as the examinations are completed they are to be sealed up and directed to the proper district court, together with all the ship's papers which have not been already lodged by the captors in the registry of the court.

It is upon the ship's papers and depositions thus taken and transmitted that the cause is, in the first instance, to be heard and tried (1 *Rob.*, 1, the 'Vigilantia'). This is not a mere matter of practice or form: it is of the very essence of the administration of prize law; and it is a great mistake to admit the common law notions, in respect to evidence, to prevail in proceedings which have no analogy to those at common law. In some few of the district courts it was not unusual, during the late war, to allow the witnesses to be examined, *orally*, at the bar of the court, long after their preparatory examinations had been taken, and full opportunities had been given to enable the parties to shape any new defence, or explain away any asserted facts. This was, unquestionably, a great irregularity, and, in many instances, must have been attended with great public mischiefs. By the law of prize the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured vessel. The captors are not, unless under peculiar circumstances, entitled to adduce any intrinsic testimony. It is, therefore, of the last importance to preserve the most rigid exactness as to the admission of evidence; since temptations would otherwise be held out to the captured crew to defeat the just rights of the captors by subsequent contrivances, explanations, and frauds. There can be no honest reason why the whole truth should not be told by the captured persons, at the first examination; and if they then prevaricate, or suppress important facts, it must be from motives which would materially impair the credibility of their subsequent statements. Where the justice of the case requires the admission of new evidence, that may always be obtained, except where, by the rules of law, or the misconduct of the parties, the right to further proof has been forfeited. But whether such further proof be necessary or admissible can never be ascertained until the cause has been fully heard upon the facts, and the law arising out of the facts already in evidence. And, in the Supreme Court, during the whole of the late war, no further proof was ever admitted until the cause had been first heard upon the original evidence, although various applications were made to procure a relaxation of the rule. We shall have occasion hereafter to state some of the cases in which further proof is allowed or denied. If a person wishes to procure the restitution of any property captured as prize, it is necessary that he should, after the prize libel is filed, and at, or before, the return of the monition thereon, or time assigned for the trial, enter his claim for such property before the proper court. And if the captors omit, or unreasonably delay, to institute prize proceedings, any person claiming an interest in the captured property may obtain a monition against them, citing them to proceed to adjudication; which if they omit to do, or to show cause why the property should be condemned, it will be restored to the claimants proving an interest therein. And the same process is often resorted to where the property is lost or destroyed, through the fault or negligence of the captors, in order to obtain a compensation in damages for the unjust seizure and detention. (1 *Rob.*,

93, the 'Betsey;' 1 *Rob.*, 181, the 'Mentor;' 3 *Rob.*, 239, the 'Huldah;' *ibid.* 129, the 'Der Mohr;' *ibid.* 212, the 'George;' 4 *Rob.*, 215, the 'William; 6 *Rob.*, 48, the 'Susanna.') The claim should be made by the parties interested, if present, or, in their absence, by the master of the ship, or some agent of the owners. A mere stranger will not be permitted to interpose a claim merely to speculate on the chances of an acquittal. The claim must be accompanied with an affidavit stating briefly the facts respecting the claim and its verity. This affidavit should be sworn to by the parties themselves, if they are within jurisdiction; but if they are absent from the country, or at a very great distance from the place where the court is held, the affidavit may be sworn to by an agent. Before a claim is made, and affidavit put in (which should always be special if the case stands on peculiar grounds), it is not permitted to the parties to examine the ship's papers and the preparatory examinations in order to shape their claims; for this might lead to great abuses. But if it be necessary to ascertain the particulars of a claim, the court will, upon a special application, suffer so many of the papers to be examined as directly relate to such claim; but a sufficient reason is always expected to be shown on affidavit to sustain such an application. (3 *Rob.*, 233, the 'Port Mary.') It is a general rule that no claim is to be admitted which stands in entire opposition to the ship's papers and to the preparatory examinations. (5 *Rob.*, 15, 19, the 'Vrow Anna Catharina;' 6 *Rob.*, 1, 'La Flora.') But this only applies to cases arising during the war (5 *Rob.*, 15, the 'Anna Catharina'); and it is not so inflexible as to exclude the interest of a citizen or subject, where there is an absolute necessity to simulate papers, as in the case of a trade with the enemy licensed by the State. (6 *Rob.*, 1, 'La Flora.') It is also a general principle that no citizen or subject can be admitted to claim in a prize court, where the transaction in which he is engaged is in violation of the municipal laws of his own country. (2 *Rob.*, 77, the 'Walsingham Packet;' 4 *Rob.*, 262, note, the 'Etrusco;' 5 *Rob.*, 23, the 'Cornelis and Maria;' *ibid.* 251, the 'Abby;' 6 *Rob.*, 341, the 'Recovery.') Nor can a person be admitted to claim where the trade in which he is taken is forbidden by the law of nature, and by the municipal laws of his own country, and that where the court is sitting. ('Edinburgh Review,' vol. xvi. No. 21, p. 426, the 'Amédie.') Nor can an enemy interpose a claim, unless under the protection of a flag of truce, a cartel, license, pass, treaty, or some other act of the public authority suspending his hostile character. (1 *Rob.*, 196, the 'Hoop.') And even in a case where the capture has been made in violation of the territorial jurisdiction of a neutral country, the claim for restitution must be made, not by the enemy proprietor, but the neutral government. (5 *Rob.*, 15, the 'Vrow Anna Catharina;' 3 *Rob.*, 162, note.)

Where no claim is interposed, it is not now usual to condemn the goods for want of a claim, until a year and a day have elapsed from the time of the return of the monition, except in cases where there is a strong presumption, and reasonable proof that the property actually belongs to an enemy. (1 *Rob.*, 26, 29, the 'Staadt Embden.' And *see* 4 *Rob.*, 43, the 'Henrick and Maria.' *Coll. Mar.*, 88, note.) But after a year and a day have elapsed condemnation goes of course, if there be no claim interposed. After a claim is once put in, it is not amendable of course; but if an amendment is wanted to correct the generality of the original claim it will not be allowed, unless a proper case is made out, and sufficient reasons given for the omission in the first instance. (3 *Rob.*, 109, the 'Graaf Bernstorff.' And *see* 3 *Rob.*, 179, the 'Sally.') It often happens that persons whose property has been captured apply to the court for a delivery upon bail, and under a mistaken notion that such a delivery after an appraisement was a matter of course, or was to be governed by the same rules as are prescribed in the case of municipal forfeitures, under

the Act of March 2, 1799, chap. 128. Some of the district courts have allowed such applications, before any hearing of the cause; and parties have thereby, sometimes, fraudulently obtained possession of goods at an under-valuation where their title was totally defective, or grossly illegal. It is a settled rule of the prize court, not to deliver a cargo on bail, before the cause has been fully heard, unless by the consent of all parties; and if any inconvenience should result from this rule, as if the property be perishable, it may easily be avoided by an interlocutory sale. (3 *Rob.*, 178, the 'Copenhagen.') After the hearing, if the claimant obtain a decree in his favour, or an order for further proof, the court will listen to an application for a delivery on bail; but if this claim be rejected, or be affected by the imputation of fraudulent or unlawful conduct, the application will not be allowed, notwithstanding an appeal is interposed. Where there is a decree of condemnation, the captors are, in general, entitled to a delivery of the property, or the proceeds thereof, upon bail. On an appeal to the circuit court the property follows the appeal into that court, and is no longer subject to the interlocutory orders of the district court. It is otherwise with regard to the Supreme Court, whose decrees are always remanded to the circuit court for execution; and therefore the property always remains in the custody of the latter. In cases of delivery on bail, a stipulation, according to the course of the Admiralty, and not a bond, should be taken. Where further proof is admissible, it may, in the discretion of the court, be by affidavits and other papers introduced without any formal allegations, or by way of *plea and proof*, where formal allegations are made by each party in the nature of special pleadings; and it may be opened to the claimants only, or to the captors as well as claimants. Upon a simple order for further proof the captors are not entitled to adduce any new evidence, unless by the special direction of the court; but upon plea and proof both parties are at liberty to introduce new evidence to support their respective allegations and the points in issue. (1 *Rob.*, 313, the 'Adriana.')

The court is in no case, concluded by the original evidence, but may order further proof on a doubt arising from any course or quarter (6 *Rob.*, 351, the 'Romeo'); and it will sometimes direct it where suspicion is produced by extrinsic evidence. (*Ibid.*) But this is rarely done, unless there be something in the original evidence which lays a suggestion for prosecuting the enquiry further (3 *Rob.*, 330, the 'Sarah'); and where the case is perfectly clear, and not liable to any just suspicion, the disposition of the court leans strongly against the introduction of extraneous matter, and against permitting the captors to enter upon further enquiry. The most ordinary cases of further proof are where the cause appears doubtful upon the original papers and the answers to the standing interrogatories; and in such cases, if the parties have conducted themselves with good faith, and the error or deficiency may be referred to honest ignorance or mistake, the court will indulge them with time to supply the defects by the introduction of new evidence. But further proof is, in no case, a matter of right, and rests in the sound discretion of the court. Further proof is in all cases necessary where the master does not swear to, or give account of, the property (2 *Rob.*, 1, the 'Eenrom;' 2 *Rob.*, 121, the 'Juno;' 4 *Rob.*, 201, the 'Convenientia'); where the shipment, though stated to be on neutral account, is not stated to be on account of any particular person (4 *Rob.*, 79, the 'Jonge Pieter'); where the ship has been purchased in the enemy's country (1 *Rob.*, 122, the 'Welvaart'); where there has been any loss or suppression of material papers (2 *Rob.*, 261, the 'Polly'); and, indeed, in all cases where the defects of the papers, the conduct of the parties, the nature of the voyage, or the original evidence in general induces any doubt of the proprietary interest, the legality of the trade, or the integrity of the transactions. But it is not in every case

where further proof is necessary that the parties will be permitted to introduce it, for the privilege may be forfeited by fraud or gross misconduct. And in cases where further proof is necessary, if it is not allowed, the penal consequences are as fatal as if the property were originally hostile, since a condemnation certainly follows the denial. (1 *Rob.*, 122, the 'Welvaart;' 1 *Rob.*, 125, the 'Juffrouw Anna;' 3 *Rob.*, 109, the 'Graaf Bernstorff;' 2 *Rob.*, 1, the 'Eenrom.') Further proof is never allowed to the claimants where fraudulent papers have been used (1 *Rob.*, 122, the 'Welvaart;' 1 *Rob.*, 125, the 'Juffrouw Anna;' 1 *Rob.*, 127, the 'Juffrouw Elbrecht'); where there has been a spoliation of papers (2 *Rob.*, 104, the 'Rising Sun'); where there has been a fraudulent covering or suppression of an enemy's interest (3 *Rob.*, 109, the 'Graaf Bernstorff'); where there is a false destination and false papers (3 *Rob.*, 122, the 'Nancy;' 6 *Rob.*, 79, the 'Mars'); nor in general where the case appears incapable of fair explanation (1 *Rob.*, 163, the 'Vrow Hermina'), or where there has been gross prevarication, or an attempt to impose spurious claims upon the court, or such a want of good faith as shows that the parties cannot safely be trusted with an order for further proof. If, upon further proof ordered, no proof is adduced, or, the proof be defective, or the parties refuse to swear, or swear evasively, it is deemed conclusive evidence of hostile interests, or of such misconduct as authorises condemnation. And it is a general rule of the prize court that the *onus probandi* that the property is neutral rests upon the claimant; and if he fails to show it condemnation ensues. (2 *Rob.*, 77, the 'Walsingham Packet;' 2 *Rob.*, 343, the 'Rosalie and Betty;' 4 *Rob.*, 283, the 'Countess of Lauderdale.')

In cases where further proof is admitted on behalf of the captors they may introduce papers taken on board of another ship, if they are properly verified by affidavit. (6 *Rob.*, 351, the 'Romeo;' 1 *Rob.*, 340, the 'Maria.') And they may also invoke papers from another prize cause. (6 *Rob.*, 350, the 'Romeo;' 3 *Rob.*, 330, the 'Sarah;' 4 *Rob.*, 166, the 'Vriendschap.') It has even been permitted to the captors to invoke the depositions of the claimant given in, in another cause, to prove his domicile at the first hearing, and without an order for further proof. (4 *Rob.*, 166, the 'Vriendschap.') And upon an order for further proof the affidavits of the captors, as to facts within their own knowledge, are admissible evidence. (1 *Rob.*, 340, the 'Maria;' 6 *Rob.*, 13, the 'Resolution.')

ADDITIONAL NOTE ON THE SAME SUBJECT.

[This also was written by Judge Story; it is extracted from Wheaton's 'Reports,' vol. ii. note i. p. 429.]

The ordinary prize jurisdiction of the Admiralty extends to all captures made on the sea, *jure belli* (the 'Two Friends,' 1 *Rob.*, 271, 284); to captures in foreign ports and harbours (Lindo *v.* Rodney, *Doug.*, 613, note); to captures made on land by naval forces, and upon surrenders to naval forces, either solely or by joint operations with land forces (Lindo *v.* Rodney, *Doug.*, 613, note; 'Chinsurah,' 1 *Acton*, 179); and this whether the property so captured be goods, ships, or mere *choses in action* (*ibid.*); to captures made in rivers, ports, and harbours, of the captor's own country (W. B. *v.* Latimer, 4 *Dall.*, App. 1; Le Caux *v.* Eden, *Doug.*, 608; Lindo *v.* Rodney, *Doug.*, 613, note); to money received as a ransom or commutation on a capitulation to naval forces alone, or jointly with land forces. (Ships taken at Genoa, 4 *Rob.*, 338.) But the Admiralty, merely by its own inherent powers, never exercises jurisdiction as to captures or seizures as prize made on shore without the co-operation of naval forces, whether made in our own or in a foreign territory

(Anthon *v.* Fisher, *Doug.*, 649, note (1); Maisonnaire *v.* Keating, 2 *Gallis*, 325); whenever such a jurisdiction is exercised it is by virtue of powers derived *aliunde*. And though when the jurisdiction has once attached it may be lost by a hostile recapture, escape, or voluntary discharge (the 'Two Friends,' 1 *Rob.*, 271, 284; the 'Emulous,' 1 *Gallis*, 563), yet it remains notwithstanding the goods are landed; for it does not depend on their local situation after capture; but the court will follow the goods or their proceeds with its process, wherever they may be found, or under whatever title acquired. (Hudson *v.* Guestier, 4 *Cranch*, 293.) Therefore, where the property is carried into a foreign port, and there delivered upon bail by the captors, the prize court does not lose its jurisdiction, but may proceed to adjudication and enforce the stipulation. (Home *v.* Camden, 2 *H. Bl.*, 533; 4 *Term Rep.*, 383; Willis *v.* Commissioners of Prize, 5 *East.*, 22; the 'Noysomhed,' 7 *Ves.*, 593; the brig 'Louis,' 5 *Rob.*, 146; the 'Two Friends,' 1 *Rob.*, 271; the 'Eliza,' 1 *Acton*, 336; Smart *v.* Wolff, 3 *Term Rep.*, 223; the 'Pomona,' 1 *Dodson*, 25.) So, if a prize be lost at sea, the court may, nevertheless, proceed to adjudication, either at the instance of the captors or of the claimants (the 'Susannah,' 6 *Rob.*, 48; the 'Peacock,' 4 *Rob.*, 185); so, although the property may be actually lying within a foreign neutral territory, the court may proceed to adjudication (Hudson *v.* Guestier, 4 *Cranch*, 293; the 'Christopher,' 2 *Rob.*, 209; the 'Henrick and Maria,' 4 *Rob.*, 43; the 'Comet,' 5 *Rob.*, 285; the 'Victoria,' *Edwards*, 97); so, although the property has been sold by the captors, or has passed into other hands (the 'Falcon,' 6 *Rob.*, 194; the 'Pomona,' 1 *Dodson*, 25); but it rests in the sound discretion of the court whether, when property has been sold or converted by the captors, it will proceed to adjudication *in their favour*; for it is only in cases where the same has been justifiably or legally converted by the captors that they can claim its aid. The court will withhold that aid where there has been a conversion by the captors without necessity or reasonable cause. ('L'Eole,' 6 *Rob.*, 220; 'La Dame Cécile,' 6 *Rob.*, 257; the 'Arabella and Madeira,' 2 *Gallis*, 368.) When once the prize court has acquired jurisdiction over the principal cause, it will exert its authority over all the incidents. It will follow, as has been already observed, prize proceeds into the hands of agents or other persons holding them for the captors, or by any other title; and in proper cases will decree the parties to pay over the proceeds, with interest upon the same for the time they have been in their hands. (Smart *v.* Wolff, 3 *Term Rep.*, 313; Home *v.* Camden, 2 *H. Bl.*, 533; 4 *Term Rep.*, 382; Jennings *v.* Carson, 4 *Cranch.*, 1; the 'Two Friends,' 1 *Rob.*, 273; Willis *v.* Commissioners of Prizes, 5 *East*, 22; the 'Noysomhed,' 7 *Ves.*, 593; the 'Princesa,' 2 *Rob.*, 31; the 'Louis,' 6 *Rob.*, 146.) It may also enforce its decrees against persons having the proceeds of prizes in their hands, notwithstanding no stipulation, or an insufficient stipulation, has been taken on a delivery on bail; for it may always proceed *in rem* where the *res* can be found, and it is not confined to the remedy on the stipulation (per Buller, J., in 3 *Term Rep.*, 323; per Grose, J., in 5 *East.*, 22; the 'Pomona,' 1 *Dodson*, 25; the 'Herkimer,' *Stewart*, 128; S. C., 2 *Hall, Am. Law Journal*, 133); and in these cases the court may proceed upon its own authority *ex officio*, as well as upon the application of parties (the 'Herkimer,' *Stewart*, 128; S. C., 2 *Hall, Am. Law Journal*, 133); nor is the court *functus officio* after sentence pronounced, for it may proceed to enforce all rights, and issue process therefor, so long as anything remains to be done touching the subject matter. (Home *v.* Camden, 2 *H. Bl.*, 533; and cases *ubi supra*.)

The prize court has also exclusive jurisdiction as to the question who are the captors and joint captors entitled to share in the distribution, and

its decree is conclusive upon all parties. (Home *v.* Camden, 2 *H. Bl.*, 533; 4 *Term Rep.*, 382; the 'Herkimer,' *Stewart*, 128; S. C., 2 *Hall, Am. Law Journal*, 133; Duckworth *v.* Tucker, 2 *Taunton*, 7.) It has the same exclusive authority as to the allowance of freight, damages, expenses, and costs in all cases of captures (Le Caux *v.* Eden, *Doug.*, 594; Lindo *v.* Rodney, *Doug.*, 613; Smart *v.* Wolff, 3 *Term Rep.*, 223; the 'Copenhagen,' 1 *Rob.*, 289; the 'St. Juan Baptista,' 5 *Rob.*, 33; the 'Die Frie Damer,' 5 *Rob.*, 357; the 'Betsey,' 1 *Rob.*, 93; Duckworth *v.* Tucker, 2 *Taunt.*, 7; Jennings *v.* Carson, 4 *Cranch*, 2; Bingham *v.* Cabot, 3 *Dall.*, 19; the United States *v.* Peters, 3 *Dall.*, 121; Talbot *v.* Johnson, 3 *Dall.*, 133; 2 *Brown's Civ. and Adm. Law*, 208), and though a mere maritime tort unconnected with capture *jure belli* may be cognisable by a Court of Common Law; yet it is clearly established that all captures *jure belli*, and all torts connected therewith, are exclusively cognisable in the prize court. And the prize court will not only entertain suits for restitution and damages in case of wrongful capture, and award damages therefor; but it will also allow damages for all personal torts, and that upon a proper case laid before the court as a mere incident to the possession of the principal cause. And in such a case it will not confine itself to the actual wrongdoer; but it will apply the rule of *respondeat superior*, and decree damages against the owners of the offending privateer (Del. Col. *v.* Arnold, 3 *Dall.*, 333; the 'Anna Maria,' 2 *Wheaton*, 327; Bynk., *Q. J. Pub. L.*, i. ch. 19; *Du Ponceau's translation*, 147); and where the captured crew have been grossly ill-treated, the court will award a liberal recompense. (The 'St. Juan Baptista,' 5 *Rob.*, 33; the 'Die Frie Damer,' 5 *Rob.*, 357; the 'Lively,' 1 *Gallis*, 315.) As the prize court has an unquestionable jurisdiction to apply confiscation by way of penalty for falsity, fraud, and misconduct of citizens as well as of neutrals (the 'Johanna Tholen,' 6 *Rob.*, 72; Oswell *v.* Vigne, 15 *East.*, 70), so it may, in like manner, decree a forfeiture of the rights of prize against captors, where they have been guilty of gross irregularity, or criminal neglect, or wanton impropriety and fraud. It is a part of the ancient law of the Admiralty, independent of any statute, that captors may, by their misconduct, forfeit the rights of prize; and in such cases the property is condemned to the Government generally. And this penalty has been frequently enforced, not only where the captors have been guilty of fraud (8 *Cranch.*, 421, the 'George,' 2 *Wheat.*, 278), but also where they have violated the instructions of Government relative to bringing in the prize crew, and have proceeded without necessity to dispose of the property before condemnation ('La Reine des Anges,' *Stewart*, 9); so where the captors have rescued a prize ship from the custody of the marshal, after a monition duly served. (The 'Cossack,' *Stewart*, 513.) In short, the court is the constitutional guardian of the public interests in relation to matters of prize; and wherever there is any deviation from the regular course of proceedings, it expects to have a sufficient reason shown for that deviation, before it will give the captors any of the ordinary benefits of prizes captured by them. The usual course of the court is by way of monition; and if that process be disobeyed, an attachment issues against the parties in contempt. But the court may, in all cases, proceed, in the first instance, by warrant of arrest of the person or property, to compel security to abide its decree.

CHAPTER XXXIII

RIGHTS OF MILITARY OCCUPATION

1. Military occupation and complete conquest distinguished—2. When rights of military occupation begin—3. Submission sufficient—4. Effect upon political laws—5. Upon municipal laws—6. Punishment of crimes in such territory—7. Laws of England instantly extend over conquered territory—8. Territory occupied by the American Union—9. Distinction between Great Britain and the United States —10. American decisions—11. Powers of the President respecting alien revenues—12. Change of ownership of private property during military occupation—13. Laws relating to such transfers—14. Allegiance of inhabitants of occupied territory—15. Lawful resistance and insurrection—16. Implied obligation of the conquered—17. Of the conqueror—18. Right of revolution—19. Right of insurrection in war—20. Punishing military insurrections—21. Historical examples—22. Alienations of territory occupied by an enemy—23. Alienations made in anticipation of conquest—24. Private grants so made—25. Transfer of territory to neutrals—26. Effect of military occupation on incorporeal rights—27. Debts due to the government of the territory occupied—28. If former government be restored—29. Examples from ancient history—30. Examples from modern history.

Distinction between military occupation and complete conquest

§ 1. THE term *conquest*, as it is ordinarily used, is applicable to conquered territory the moment it is taken from the enemy; but, in its more limited and technical meaning, it includes only the real property to which the conqueror has acquired a *complete title*. Until the ownership of such property so taken is confirmed or made complete, it is held by the right of *military occupation* (*occupatio bellica*), which, by the usage of nations and the laws of war, differs from, and falls far short of, the right of *complete conquest* (*debellatio, ultima victoria*). These will form the subjects of the next two chapters. The right of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer. We, therefore, do not look to the constitution, or political institutions of the conqueror, for authority to establish a government for the territory of the enemy in his possession,

during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority, and such rules, are derived directly from the laws of war, as established by the usage of the world, and confirmed by the writings of publicists, and the decisions of courts—in fine, from the law of nations. But when the conquest is made complete, in whatsoever mode, the right to govern the acquired territory follows as the inevitable consequence of the right of acquisition, and the character, form, and powers of the government established over such conquered territory are determined by the constitution and laws of the State which acquires it, or with which it is incorporated. The government established over an enemy's territory during its military occupation, may exercise all the powers given by the laws of war to the conqueror over the conquered, and is subject to all the restrictions which that code imposes. It is of little consequence whether such government be called a *military* or a *civil* government; its character is the same, and the source of its authority the same; in either case it is a government imposed by the laws of war, and so far as it concerns the inhabitants of such territory, or the rest of the world, those laws alone determine the legality or illegality of its acts. But the conquering State may, of its own will, whether expressed in its constitution, or in its laws, impose restrictions additional to those established by the usage of nations, conferring upon the inhabitants of the territory so occupied privileges and rights to which they are not strictly entitled by the laws of war; and, if such government of military occupation violate these additional restrictions so imposed, it is accountable to the power which established it, but not to the rest of the world.[1]

When rights of military occupation begin

§ 2. We will here consider the question, when do the rights of military occupation begin, or how are we to fix the date of a conquest? Bouvier defines a conquest to be, 'the acquisition of the sovereignty of a country by *force of arms*, exercised by an independent power, which reduces the vanquished to

[1] Cocceius, *De Jure Victoriæ*, passim; Heffter, *Droit International*, §§ 131, 186; Fleming et al. *v.* Page, 9 *Howard R.*, 603; Cross et al. *v.* Harrison, 16 *Howard R.*, 164; Marcy to Kearny, June 11, 1847, *Ex. Doc.* No. 17, 31st Cong. 1st sess. H. R.; Kamptz, *Litteratur des Völk.*, § 307; Isambert, *Ann. Pol. et Dips., Int.*, p. 115; Cushing, *Opinions U.S. Attys.-Gen.*, vol. viii. p. 365; Gardner, *Institutes*, p. 208; Puffendorf, *De Jure Nat. et Gent.*, lib. viii. cap. vi. §§ 17, 27; Vattel, *Droit des Gens*, liv. iii. ch. xiii. § 197.

the submission of its empire.' It follows, then, that the rights of military occupation extend over the enemy's territory only so far as the inhabitants are vanquished or reduced to submission to the rule of the conqueror. Thus, if a fort, town city, harbour, island, province, or particular section of country belonging to one belligerent, is forced to submit to the arms of the other, such place or territory instantly becomes a conquest, and is subject to the laws which the conqueror may impose on it; although he has not yet acquired the *plenum dominium et utile*, he has the temporary right of possession and government. As this temporary title derives its validity entirely from the force of arms on the one side, and submission to such force on the other, it necessarily follows that it extends no further, and continues no longer, than such subjugation and submission extend and continue. Thus, if one belligerent take possession of a port, or town, or province of the other, he cannot, therefore, pretend to extend his government and laws over places or provinces which he has not yet reduced to submission, or, by reason of a particular possession, to claim a general control and authority. By occupying a port of an enemy's coast, we have a right, so long as we retain its possession, to exclude neutral vessels from such port, or admit them on such terms as to us may seem fit and proper; but we cannot exclude neutral vessels, or impose our regulations upon neutral commerce in ports of the enemy which are not in our possession. To extend the rights of military occupation, or the limits of conquest, by mere intention, implication, or proclamation, would be establishing a *paper conquest*, infinitely more objectionable in its character and effects than a *paper blockade*. 'The rule is,' says Wildman, 'that the whole is possessed by the occupation of a part, if an intention to appropriate the whole accompany such occupation, *and all others be excluded from occupying the residue*. Otherwise, possession of real property would be impossible, as it does not admit of manual apprehension or corporal incumbency in all its parts. Two persons cannot have several possessions of the same thing at the same time: such possession of one excludes the possession of another. Hence, if one be in possession, and another enter upon part which is not in the actual possession of the first, by such entry he gains possession of no more than he actually occupies. The con-

structive occupation of the owner is defeated by actual occupation, so far as it extends. Thus it is said by Celsus, if an enemy enter a territory by force of arms, it is in possession of so much only as it occupies. When he speaks of force, he supposes resistance on behalf of the sovereign, in defence of his possession. *An army only possesses a country so far as it compels the enemy's forces to retire.* The meaning of Paulus is probably the same, when he says that possession of part with an appropriating mind, is possession of the whole, up to its boundary. By boundary, he signifies the commencement of another's possession. Upon these principles, the extent of hostile possession may be distinctly defined. If an army be in possession of a principal town of a province, it is not thereby in possession of the towns and forts within the same, which hold out for the enemy. Forcible possession extends so far only as there is an absence of resistance. The occupation of part by right of conquest, with intent to appropriate the whole, gives possession of the whole, *if the enemy maintain military possession of no portion of the residue.* Under such circumstances, military possession of a capital would be possession of a whole kingdom. *But if any part hold out, so much only is possessed as is actually conquered.* Thus both the States-General and the King of Spain maintained, during the controversies that arose out of the truce between Spain and the United Provinces, that the possession of the surrounding country follows the possession of a town. The military possessors of a town must necessarily have the surrounding country in their power, unless there be a fortress within it; in which case, the country commanded by the fortress would not be in their possession. These principles show the absurdity of the pretensions of the Western and Eastern empires that have been founded on the possession of Rome and Constantinople.' The same principles are recognised in the decision of Calvin's case. 'Now come we,' says Lord Coke, 'to France and the members thereof, as Calais, Guynes, Tournay, &c., which descended to King Edward III., as son and heir to Isabel, daughter and heir to Philip le Beau, King of France. Certain it is, whilst King Henry VI. had both England and the heart and greatest part of France under his actual legiance and obedience (for he was crowned King of France in Paris), that they that were then born *in those parts of France*

that were under actual legiance and obedience, were no aliens, but capable of, and heritable to, lands in England. Those born in parts of France not under actual legiance and obedience, and prior to King Henry's recognition and coronation, were regarded as *antenati*, and received letters patent of denisation, as in the case of Reynel.'[1]

Submission sufficient

§ 3. It must not be inferred from what has just been said, that the conqueror can have no control or government of hostile territory unless he actually occupies it with an armed force. It is deemed sufficient that it submits to him and recognises his authority as a conqueror; for conquests are in this way extended over the territory of an enemy without actual occupation with armed force. But so much of such territory as refuses to submit, or to recognise the authority of the conquerer, and is not forcibly occupied by him, cannot be regarded as under his control or within the limits of his conquest; and he therefore cannot pretend to govern it, or to claim the temporary allegiance of its inhabitants, or in any way to direct or restrict its intercourse with neutrals. It remains as the territory of its former sovereign—hostile to him, as a belligerent, and friendly to others, as neutrals. The government of the conqueror being *de facto* and not *de jure*, it must always rest upon the fact of *possession*, which is adverse to the former sovereign, and therefore can never be inferred or presumed. In other words, the rights of the conqueror are those of possession, and not of title, and whenever brought in question they must be proved, and cannot be presumed. Not only must the possession be actually acquired but it must be *maintained*. The moment it is lost, the rights of military occupation over it are also lost. In the words of Chief Justice Taney, 'By the laws and usages of nations, conquest is a valid title *while the victor maintains the exclusive possession* of the conquered country.'[2]

[1] Wildman, *Int. Law*, vol. i. pp. 163, 164; Calvin's case, *Coke R.*, pt. vii. p. 220; Justinian, *Pandects*, xli. 2; xviii. 4; Schwartz, *De Jure Vic. in Res Incorp.*, th. 27; Bouvier, *Law Dic.*, verb. 'Conquest;' Duponceau, *Translation of Bynkershoek*, p. 116, note.

[2] Fleming et al. *v.* Page, 9 *Howard R.*, 614. During the Franco-German war, 1870, the Germans declared that their passage through a French district placed that part of the territory under their military code (for which *see ante*, p. 46). Further, they pretended that they 'theoretically occupied a district'—that is to say, without any formal declaration, and even without placing chalk marks on the doors of the houses (a

§ 4. Political laws, as a general rule, are suspended during the military occupation of a conquered territory. The political connection between the people of such territory and the State to which they belong is not entirely severed, but is interrupted or suspended so long as the occupation continues. Their lands and immovable property are, therefore, not subject to the taxes, rents, &c., usually paid to the former sovereign. These, as we have said elsewhere, belong of right to the conqueror, and he may demand and receive their payment to himself. They are a part of the spoils of war, and the people of the captured province or town can no more pay them to the former government than they can contribute funds or military munitions to assist that government to prosecute the war. To do so would be a breach of the implied conditions under which the people of a conquered territory are allowed to enjoy their private property, and to pursue their ordinary occupations, and would render the offender liable to punishment. They are subject to the laws of the conqueror, and not to the orders of the displaced government. Of lands and immovable property belonging to the conquered State, the conqueror has, by the rights of war, acquired the use so long as he holds them. The fruits, rents, and profits are, therefore, his, and he may lawfully claim and receive them. Any contracts or agreements, however, which he may make with individuals farming out such property, will continue only so long as he retains control of them, and will cease on their restoration to, or recovery by, their former owner.[1]

Effect upon political laws

sign which they adopted to designate where their troops were billetted), they declared a district to be occupied by them, on the mere fact of having entered it. (Edwards, *Germans in France.*)

[1] Am. Ins. Co. *v.* Canter, 1 *Peters R.*, 542; Burlamaqui, *Droit de la Nat. et des Gens*, t. v. pt. iv. ch. vii.

During the Franco-German war, 1870, open letters were forwarded by the German 'Feldpost' to French towns in their occupation. Also, to facilitate regular purchases in such towns, they published a table of exchange, declaring, with perfect fairness, the currency value of German money. (Edwards, *Germans in France.*)

Whilst they were occupying Versailles, no person could go in or out of that town, without a *permit* from the German military authorities. The French mayor continued his civil duties, and the French flag remained over the *mairie* all the time. (Delerot, *Versailles.*)

Regulations such as the following were issued by the Germans, as to the general conduct of the inhabitants in occupied districts: viz. that they give up their arms; that they put out their lights at a certain hour, and in case of a disturbance at night show lights in all their windows; that they hold no communication with 'the enemy,' or with any person

Upon municipal laws

§ 5. The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. Important changes of this kind are seldom made, as the conqueror has no interest in interfering with the municipal laws of the country which he holds by the temporary rights of military occupation. He nevertheless has all the powers of a *de facto* government, and can, at his pleasure, either change the existing laws or make new ones. Such changes, however, are, in general, only of a temporary character, and end with the government which made them. On the confirmation of the conquest by a treaty of peace, the inhabitants of such territory are, as a general rule, remitted to the municipal laws and usages which prevailed among them prior to the conquest. Neither the civil nor the criminal jurisdiction of the conquering State is considered, in international law, as extending over the conquered territory during military occupation. Although the national jurisdiction of the conquered power is replaced by that of military occupation, it by no means follows that this new jurisdiction is the same as that of the conquering State. On the contrary, it is usually very different in its character, and always distinct in its origin. Hence, the ordinary jurisdiction of the conquering State does not extend to matters of procedure, whether civil or criminal, originating in the occupied territory. 'Military occupation and military government,' says Ortolan, 'are not sufficient to change the national jurisdiction, and to substitute the jurisdiction of the occupying State for that of the territory temporarily occupied. Such an effect is produced only by incorporation or definitive occupation. We refer here only to the jurisdiction of Common Law, and the ordinary and usual

in the unoccupied part of the country; that they do not act voluntarily as guides to 'the enemy;' if called upon to act as guides to the occupying troops, they will mislead them at their peril; that they do not join the hostile army, nor form bands on their own account; that they do not cut the telegraph or injure the railway; the penalty for disobedience in such case is death; if the railway or telegraph is injured and the offender cannot be discovered, a fine is imposed on the town or commune: and if the fine or the usual money contribution be not forthcoming, hostages are taken and detained until it is paid. The townspeople are to remain tranquil; all in the neighbourhood are to remain tranquil; they are to furnish the requisitions demanded from them and help the local authorities to pay the money contribution, and their lives and persons will be safe and their property protected. (Edwards, *supra*.)

cognisance of cases, without in any manner diminishing the rights derived from war, and the measures necessary for the government of military occupation.' The author then refers to a decision of the Court of Cassation on appeal from the Court of Assizes of the Pyrénées Orientales, in the case of Villasseque, a Frenchman, charged with the crime of assassination committed in the territory of Catalonia, Spain, during the military occupation by France, in the summer of 1811. It was contended by the prosecution that, inasmuch as Catalonia was occupied by French troops, and the government administered by French authorities, it must be considered as French territory; but the court in its decision (*Arrêt du 22 Janvier* 1818) said: 'This occupation and this administration by French troops and French authorities had not communicated to the inhabitants of Catalonia the title of Frenchmen, nor to their territory the quality of French territory; this communication could result only from an act of union emanating from the public authority, which never existed.' The same view has been taken by the Attorney-General of the United States with respect to crimes committed in Mexico during the military occupation of that country by the United States.[1]

Punishment of crimes in such territory

§ 6. How, then, are crimes to be punished which are committed in territory occupied by force of arms, but which are not of a military character nor provided for in the military code of the conquering State? To solve this question it will be sufficient to recur to the principles already laid down. Although the laws and jurisdiction of the conquering State do not extend over such foreign territory, yet the laws of war confer upon it ample power to govern such territory, and to punish all offences and crimes therein by whomsoever committed. The trial and punishment of the guilty parties may be left to the ordinary courts and authorities of the country, or they may be referred to special tribunals administering martial law,[2] organised for that purpose by the government

[1] Heffter, *Droit International*, § 131; Ortolan, *Diplomatie de la Mer*, liv. ii. ch. xiii.; Campbell *v.* Hall, 1 *Cowp. R.*, 204; Toucey, *Opinions U. S. Attys.-Gen.*, vol. v. p. 55; Kamptz, *Literatur des Völkerrechts*, § 307; Cocceius, *De Jure Vict. in Res Incorp.*, passim.

[2] 'The proclamation of martial law renders every man liable to be treated as a soldier. The instant the necessity ceases, that instant the state of soldiership ought to cease, and the rights with the relations of civil life to be restored.' (*Per* Lord Brougham, Debate on the trial of the Rev. John

of military occupation; and where they are so referred to special tribunals, the ordinary jurisdiction is to be considered as suspended *quoad hoc*. It must be remembered that the authority of such tribunals has its source, not in the laws of the conquering, nor in those of the conquered State, but, like any other powers of the government of military occupation, in the laws of war; and, in all cases not provided for by the laws actually in force in the conquered territory, such tribunals must be governed and guided by the principles of universal public jurisprudence. How far the laws of the former government continue in force after the conquest, and how far they

Smith by court-martial, *Parl. Debates*, 1824.) In the field, all followers and retainers of an army become subject to the restraint of military law; and the custom of war and the necessity of the case also justifies the punishment, by sentence of court-martial, of certain crimes against the safety of the army, or the person or the property of individuals belonging to it, or entitled to its protection, when the offenders themselves neither belong to nor are connected with the service. The declaration of martial law renders all persons amendable to courts-martial, on the order of the military authority, so long as the civil judicature is not in force. There is also a modified exercise of martial law, when, by special intervention of the authority exercising the legislative power, courts-martial have been erected into tribunals, for the trial of persons not subject to military law for certain specified offences, although the ordinary course of law may have been partially restored, or had never been altogether stayed. As instances of the special laws creating this exceptional jurisdiction may be mentioned—the Statute (Ir.) 39 Geo. III., c. 11, passed in Ireland in 1798, which was revived by the Irish Act, 40 Geo. III., c. 2, and further continued by the 41 Geo. III., c. 14; the Statute 43 Geo. III., c. 117, which was passed in the Imperial Parliament in 1803, re-enacting the principal provisions of that before mentioned; and the Ordinance (Canada) 2 Vict., c. 3, passed in Canada in 1838. These Acts authorise the exercise of the powers which they may confer on the executive, 'whether the ordinary courts shall or shall not be open,' and do not lay down any deviation from the ordinary manner of proceeding in the case of courts-martial held under them. The Irish Coercion Act, passed in 1833 (3 and 4 Will. IV., c. 4), regulated the rank of the members, the punishment to be awarded, and, among other peculiar enactments, provided (sec. 14) that the parties before the court might have the assistance of council and attorneys. In Great Britain the preamble of each successive Army (annual) Act reasserts the illegality of martial law in time of peace, by reciting from the Petition of Right that no man 'be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm by martial law.' Indirectly, therefore, it recognises the legality of resorting to this expedient, in time of war and intestine commotion. No legal dogma can be clearer, and being each year recognised by Parliament, it is entitled to all the difference which may be due to an Act of the legislature so repeatedly revised and considered. The legal right, or, more properly, the power of the sovereign, or the representative of Majesty, to proclaim martial law, has been fully set forth in many Statutes, and the acknowledged prerogative of the Crown to resort to the exercise of martial law against open enemies or traitors is expressly declared. (*See* also vol. i. p. 544.)

are replaced by those of the conquering State, by those enacted by the government *de facto*, or by new principles of jurisprudence, or usages and customs introduced with the conquerors, is considered in other places, and need not be repeated here. In the war between the United States and the republic of Mexico, it was found that no provisions had been made in the United States Rules and Articles of war for numerous cases, civil and criminal, between citizens of the United States and between such citizens and foreigners, in Mexican territory occupied by the troops of, but without the jurisdiction of any court of, the United States. All such cases, of a criminal character, arising in the territory of Mexico occupied by the 'main army' under General Scott, were referred by him to 'military commissions,' which were special tribunals constituted and appointed for that purpose; in California they were usually left to be decided by the ordinary tribunals of the country, although special tribunals were there organised, in a few special cases, by the government of military occupation. This was in conformity with principle; the martial law of the conqueror being the governing rule, while the civil or special tribunal was the instrument of, or acted in subordination to, this military power; the limitations to this martial law being the laws of war.[1] But the military commissions, organised

[1] Gardner, *Inst. of Am. Int. Law*, p. 208; Cushing, *Opinions of U. S. A.-G.*, pp. 365 et seq.; Howard, *Parl. Deb.*, N.S., vol. cxv. p. 880; Scott, *General Orders*, No. 20, Feb. 19, 1847; Marcy to Scott, Feb. 15, 1847; *Cong. Doc.*, No. 60, 30th Cong., 1st sess. H. of R., p. 874.

In 1865 one Lambdin P. Milligan presented a petition to the Circuit Court of the United States, for the district of Indiana, to be discharged from an alleged unlawful imprisonment. The case made by the petitioner was this:—Milligan was a citizen of the United States; had lived for twenty years in Indiana, and at the time of the grievances complained of was not, and never had been, in the military or naval service of the United States. On Oct. 5, 1864, while at home, he had been arrested by order of General Hovey, commanding the military district of Indiana, and had been kept in close confinement. On the 21st of that month he was brought before a military commission, convened at Indianapolis by order of General Hovey, tried on certain charges and specifications, found guilty, and sentenced to be hanged. On the matter being eventually brought before the Supreme Court, in December 1866, Mr. Justice Davis, in delivering the opinion of the Court, remarked that no 'graver question had ever been considered by that Court than the one then before them, viz. Had the military commission jurisdiction, legally to try and sentence the petitioner? There is no question which more nearly concerns the rights of the whole people of the United States, for it is the birthright of every American citizen, when charged with crime, to be tried and to be punished according to law. This Court has judicial knowledge that, in Indiana, the Federal authority was always unopposed,

during the Civil War of 1863 in the United States, in a State not invaded and not engaged in rebellion, in which the and its courts always open to hear criminal accusations and to redress grievances during the Civil War. No usage of war could sanction a military trial there, for any offence whatever of a citizen in civil life, in no wise connected with the military service; Congress could grant no such power; and to the honour of the legislature it may be said that it had never been provoked by the state of the country even to attempt to exercise it. One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and not composed of judges appointed during good behaviour. . . . The discipline necessary to the efficiency of the army and navy requires other and swifter modes of trial than are furnished by the Common Law courts; and in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service. Every one connected with these branches of the public service, is amenable to the jurisdiction which Congress has created for their government, and while thus serving surrenders his right to be tried by the civil courts. All other persons, citizens of States where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. . . . It is claimed that martial law covers, with its broad mantle, the proceedings of a military commission. The proposition is this: that in a time of war the commander of an armed force (if, in his opinion, the exigencies of the country demand it, and of which he is to judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position be sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the executive, substitute military force for and to the exclusion of the laws, punish all persons as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance, for, if true, Republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of a constitution, and effectually renders the "military independent of and superior to the civil power," a reason assigned by the United States to the world as one of the causes which impelled them to declare their independence. Civil liberty, and this kind of martial law, cannot endure together; the antagonism is irreconcileable, and in the conflict one or the other must perish. . . . It follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If in foreign invasion or civil war the courts are actually closed and it is impossible to administer criminal justice according to law, then on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority thus overthrown to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. Because during the late rebellion it could have been enforced in

Federal Courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence a citizen who was neither a resident of a rebellious State nor a prisoner of war, nor a person in the military or naval service. Congress could not invest a military commission with such power, owing to the Constitution of the United States. For the same reason suspension of the privilege of the writ of *habeas corpus* does not suspend the writ itself.

Effect of military occupation under the laws of England

§ 7. It is said by English writers, that when a country has been conquered by British arms, it immediately becomes a dominion of the King in right of his Crown, and that the inhabitants of such conquered territory, once received under the King's protection, become his subjects, and are universally to be regarded in that light, and not as enemies or aliens. As no other act than that of conquest is requisite to make the conquered territory a dominion of the Crown, and nothing more than the submission to the King's authority and protection, on the part of the inhabitants of such territory, is necessary to make them subjects of the King, such territory is no longer to be regarded, either by other nations or by other parts of the British empire, as a foreign country, or its inhabitants as aliens. In other words, foreign territory becomes a dominion, and its inhabitants the subjects of the King, *ipso facto*, by the conquest made by the British arms, without any action of the legislature—the Parliament of Great Britain.[1]

§ 8. But a different rule holds in the United States. The

Virginia, where the national authority was overturned and the courts driven out, it does not follow that it should obtain in Indiana, where that authority was never disputed and justice was always administered. And so in the case of a foreign invasion martial rule may become a necessity in one State, when in another it would be "mere lawless violence."' (*Ex parte* Milligan, 4 *Wall.*, 131; *see* also *Geoffroy's Case* in France, Forsyth, *Cases and Opinions*, 483; Phillipps *v.* Eyre, *L. R.*, 6 *Q. B.*, 1.)

In February 1866 it was resolved by Congress that the condition of the former Confederate States fully justified the President in maintaining the suspension of the writ of *habeas corpus* in those States, and that the condition of those States fully justified the President in maintaining the military possession and control of them.

[1] Calvin's case, *Coke R.*, part vii.; Elphinstone *v.* Bedreechund, *Knapp. R.*, 338; Campbell *v.* Hall, 23 *State Trials*, 322; Fabrigas *v.* Moslyn, 1 *Cowp. R.*, 165; Callet *v.* Lord Keith, 2 *East. R.*, 260; Blankard *v.* Guldy, 4 *Mod. R.*, 225.

Under the constitution of the United States

peculiar character of that government, and the powers vested in it by the Federal Constitution, have given rise to rules somewhat peculiar and anomalous, with respect to the government of conquered territory. The President, in the exercise of his constitutional power as commander-in-chief of the army, and the military officers under his authority, may, when war has been declared, seize the enemy's possessions, and establish a government and laws for the territory so seized and occupied. Such territory is subject to the sovereignty and dominion of the United States as soon as the enemy is driven out or submits to their arms. But neither the President nor his officers can extend the limits, or enlarge the boundaries of the union. This can only be done by Congress. As the institutions and laws of the United States do not extend beyond the limits before assigned to them by the legislative power, the inhabitants of a conquered territory, during its military occupation by the United States, can claim none of the rights and privileges established by such laws. And even where these institutions and laws are adopted by the government of military occupation, the rights which they confer upon the inhabitants of the conquered territory do not extend to the States or territories of the United States. The conquered territory is under the sovereignty and authority of the Union ; but it is not a part of the United States ; nor does it cease to be a foreign country, or its inhabitants cease to be aliens, in the sense in which these words are used in the laws of the United States. They are to be governed by martial law, as regulated and limited by public law. But such territory forms no part of the Union, and its inhabitants have none of the rights, immunities, and privileges of citizens of the United States, under the Federal Constitution and laws ; nevertheless, other nations are bound to regard the conquered territory, while in the possession of the United States, as its territory, and to respect it as such, and to regard its inhabitants as under its protection and government ; ' for, by the laws and usages of nations,' says Chief Justice Taney, ' conquest is a valid title, while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, have a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regards all other nations, it is a part of the United States,

and belongs to them as exclusively as the territory included in our established boundaries.'[1]

Distinction concerning relations of inhabitants with regard to foreign States

§ 9. This distinction between conquered territory in the military occupation of the United States, and territory of the United States within the limits of the Federal union, as established by Congress, is a very important one, and leads to very important consequences. It has been recognised and established by the decisions of the highest judicial authority, and must be regarded as the law of the land. The relations between the inhabitants of such conquered territory and foreign nations are, therefore, very different from the relations between the people of the United States and such nations, as previously established by treaties and commercial law. The intercourse of foreign nations with such territory, is regulated by the government of occupation, under the direction of the President of the United States, as commander-in-chief of the army, or, in other words, by martial law. Hence, the scale of duties, on goods imported into the conquered territory, and the tonnage on vessels and goods brought into the United States. The victor may either prohibit all commercial intercourse with his conquest, or place upon it such restrictions and conditions as may be deemed suitable to his purpose. To allow intercourse at all is a relaxation of the rights of war. So, also, the rules of intercourse and trade, between the inhabitants of the United States and such conquered territory, may be very different from the rules regulating the intercourse and trade between different parts of the union. An American vessel entering the port of the conquered territory, during its military occupation by the United States, must conform to the regulations adopted, and pay the duties exacted, by the government of such territory; and an American vessel, returning to the United States from a port of such territory, is regarded as coming from a foreign port, and not as engaged in the coasting trade; and the cargo is not exempt from the payment of duties as fixed by the laws of the United States for goods imported from a foreign country. The right of the victor to the revenues of the conquered territory is firmly established and recognised by the laws of war and the usage of nations. It is immaterial whether these revenues arise

[1] Fleming et al. *v.* Page, 9 *Howard R.*, 615; Cross et al. *v.* Harrison, 16 *Howard R.*, 164; Gardner, *Institutes*, p. 208.

from import taxes, rents of public property, duties on imports and exports, or from any other source; they are a part of the conquest, and rightfully belong to the conqueror. Those who are permitted to hold commercial intercourse with such territory, whether they be subjects of the conqueror, or of foreign States, must conform to the regulations, and pay the duties established by the conquering power; and, in case of conquest by the United States, the President, in the absence of legislative enactments, exercises this power.[1]

In regard to States of the Union

§ 10. The effect of military occupation, by one belligerent, of a portion of the territory of the other, so far as respects revenue laws, has been adjudicated upon by the Supreme Court of the United States: 1st, with respect to neutral territory in possession of the enemy; 2nd, with respect to territory of the United States in possession of the enemy; and 3rd, with respect to the enemy's territory in the possession of the United States. 1. In the case of the island of Santa Cruz, belonging to the Kingdom of Denmark, but in the military occupation of British forces, the Supreme Court says: 'Although acquisitions made during war are not considered as permanent until confirmed by treaty, yet, to every commercial and belligerent purpose, they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.' 2. Castine, in the United States, was captured by the British forces on the first day of September, 1814, and remained in their exclusive possession until after the ratification of the treaty of peace, in February 1815. 'By the conquest and military occupation of Castine,' says the Supreme Court, 'the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it choose to recognise and impose.

[1] Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. vii. Cushing, *Opinions U. S. Attys.-Gen.*, vol. viii. §§ 365 et seq.

From the nature of the case, no other laws could be obligatory upon them; for where there is no protection or allegiance, or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port, and goods imported into it by the inhabitants were subject to such duties only as the British Government chose to require. Such goods were in no correct sense imported into the United States.'

3. In the case of Tampico, in Mexico, which was captured and occupied by the arms of the United States, during the war with Mexico, the Supreme Court held that cargoes of goods landed there were liable to the duties charged on them by the military authorities of the United States, whether shipped from the United States or from foreign countries.[1]

Collection and use of revenues in such territory

§ 11. In the absence of any laws of Congress on this subject, the regulating and collecting of such revenues, in enemy's territory in the possession of the United States, devolves upon the President, as the constitutional commander-in-chief, and upon the military and naval officers under his direction. The moneys derived from these sources may be used for the support of the government of the conquered territory, or for the expenses of the war. They are war revenues and do not belong to the treasury of the United States until so directed by a law of Congress. Being no part of the moneys of the Treasury of the United States, their expenditure is not regulated by the general laws of the United States, but by the direction of the President of the United States, under whose authority they were collected.

During the war of 1846, between the United States and Mexico, and on the conquest of the ports of the latter republic on the Gulf of Mexico, the President of the United States formed a tariff of duties on goods from the United States and foreign countries, admitted into such ports in his military possession. A different one, however, had been previously adopted for California, by the military and naval commanders on the Pacific coast and Gulf of California, which, with certain modifications, was, with the tacit approval of the President, continued to the end of the war. Certain missions and other public property in California were rented by the military com-

[1] Thirty Hogsheads of Sugar *v.* Boyle, 9 *Cranch R.*, 191; United States *v.* Rice, 4 *Wheat. R.*, 246.

mander and governor, and certain movable property belonging to the Californian government was sold by their authority. The moneys derived from these sources constituted the 'military contribution fund,' which was used for the expenses of the government of occupation, and for carrying on the war. By subsequent Acts of Congress the moneys so collected, and not expended, were made to form a portion of funds in the Treasury of the United States, and the expenditures were settled and audited by the proper officers of the Treasury Department.[1]

Transfer of private property

§ 12. As military occupation produces no effect (except in special cases, and in the application of the severe right of war, by imposing military contributions and confiscations) upon private property, it follows, as a necessary consequence, that the ownership of such property may be changed during such occupation, by one belligerent, of the territory of the other, precisely the same as though war did not exist. The right to alienate is incident to the right of ownership, and unless the ownership be restricted or qualified by the victor, the right of alienation continues the same during his military possession of the territory in which it is situate, as it was prior to his taking the possession. A municipality or corporation has the same right as a natural person to dispose of its property during a war, and all such transfers are, *primâ facie*, as valid as if made in time of peace. If forbidden by the conqueror, the prohibition is an exception to the general rule of public law, and must be clearly established.[2]

Laws relating to such transfers

§ 13. It has been stated elsewhere, that the *lex loci rei sitæ* governs in everything relating to the tenure, title, and transfer of real property; also, that the municipal laws of a conquered territory continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. It is not necessary, however, that such change should be made by special decree: it may be done by the introduction of a different system of jurisprudence, or a different usage and custom. As a general rule, there can be no

[1] Dunlap, *Digest of Laws of U. S.*, p. 1342.

[2] Kent, *Com. on Am. Law*, vol. i. p. 92; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xii.; Cobraz *v.* Raisin, 3 *Cala. R.*, 445; Welch *v.* Sullivan, 8 *Cala. R.*, 165; Isambert, *Am. Pol. et Dip. Int.*, p. 115; Kamptz, *Literatur*, &c., § 307; Hart *v.* Burnett, 15 *Cala. R.*, 559; Payne and Dewey *v.* Treadwell, 16 *Cala. R.*, 220.

custom in relation to a matter regulated by positive law, as custom derives its force from the tacit consent of the legislative power and the people. But the sovereign will may be implied or presumed, as well as expressed by words. A series of facts, as a public, uniform, general, and continued usage, constitutes a *custom*, which has the force of law, because the sovereign will is therein implied. *Time* is the important element of customary or common law, in an established and continuous government. But where a new government, with different institutions, a different system of laws, and different customs, is suddenly established by the operations of war, and the rights of conquest, the same effect upon the common law of the country may be immediately produced, which, under other circumstances, would require 'time, whereof the memory of man runneth not to the contrary.' During the military occupation of California by the forces of the United States, the use of Mexican stamped paper was necessarily dispensed with, for conveyances, and other official writings and private contracts. And, as the local officers of the then existing government of California were generally ignorant of the Spanish language and Spanish forms of conveyancing, real estate was usually transferred by the simple deeds of conveyance commonly used in the United States. As such conveyances were seldom executed in conformity with the requisitions of Mexican municipal law, their validity rested upon the usage introduced with the government of military occupation. Titles to many millions of property in that country were transferred in this way, and the usage continued after the restoration of peace, and, until the enactment of other laws by the local government, after its organisation as a State. Conveyances so made and executed have always been regarded as valid and sufficient for the transfer of real property. In the first place, the law requiring the use of stamped paper was a law for revenue, and, consequently, was suspended, with other political laws, *ipso facto*, by the conquest, and completely abrogated by the cession. In the second place, the *lex loci rei sitæ*, with respect to the forms and execution of conveyances of real property, was also suspended in its operation, by the introduction of a different usage with the government of the conquerors, and, from the nature of the case, the inhabitants of California could hardly be considered as remitted to

this law by the restoration of peace. But this point will be more particularly discussed in chapter xxxiv.[1]

Allegiance of inhabitants of occupied territory

§ 14. It may be stated, as a general proposition, that the duty of allegiance is reciprocal to the duty of protection. When, therefore, a State is unable to protect a portion of its territory from the superior force of an enemy, it loses, for the time, its claim to the allegiance of those whom it fails to protect, and the inhabitants of the conquered territory pass under a temporary or qualified allegiance to the conqueror. The sovereignty of the State which is thus unable to protect its territory is displaced, and that of the conquered is substituted in its stead. But this change of sovereignty may be only of a temporary character, for the conquered territory may be recaptured by the former owner, or it may be restored to him by a treaty of peace. During mere military occupation the sovereignty of the conqueror is unstable and incomplete. Hence the allegiance of the inhabitants of the territory so occupied is a temporary and qualified allegiance, which becomes complete only on the confirmation of the conquest, and with the express or implied consent of the conquered.[2]

Lawful resistance and insurrection

§ 15. But when does this change of temporary allegiance actually take place? And under what circumstances may the inhabitants of a conquered city or province take up arms to repel the conqueror, and assist their former sovereign in recovering his lost possessions? These are delicate questions, not always easy of decision. And yet their resolution involves matters of the utmost importance; for the decision of the first fixes the line between justifiable homicide and murder, and that of the second will determine whether those taken in arms are to be treated as prisoners of war, or may be executed as military insurgents. As a general rule, the inhabitants of a place lose their right to resist on its complete capture or formal surrender, and the conqueror then loses his right to kill. Those who retain their arms, and refuse to

[1] Boyer, *Universal Pub. Law*, ch. xvi.; *Febrero Mexicano*, tit. prelim., cap. iv.

[2] Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. vi.; American Ins. Co. *v.* Cauter, 2 *Peters R.*, 542; Calvin's case, *Coke R.*, pt. vii.; Rayneval, *Inst. du Droit Nat.*, &c., liv. iii. ch. xx.; Heffter, *Droit International*, §§ 132, 186; Puffendorf, *De Jure Nat. et Gent.*, lib. viii. ch. vi. § 21.

surrender, are still enemies, exercising the rights of war, and subject to its consequences; but those who submit are bound by the conditions, express or implied, of such submission. Obedience to the laws which the conqueror may impose by the right of conquest, is undoubtedly one of these implied conditions. But is there no limit to such obedience, and may not those who have thus submitted to the authority of the victorious enemy throw off, at any time, this temporary allegiance to the conqueror, and restore the former and rightful sovereignty? In other words, does not their duty to their own country involve the right of insurrection against that of the conqueror? In order to arrive at a satisfactory answer to this question, it may be well to consider the more general right of *revolution*. For, although there is a broad and obvious distinction between an insurrection of a conquered city or province against the conqueror, and a revolution against an established government, yet it will be found, on examination, that both rest upon the same general principle—the relation of protection and allegiance, or the reciprocity of right and obligation.[1]

Implied obligations of the conquered

§ 16. In ancient times, when a city or district of country was conquered, the principal male inhabitants, capable of resistance, were put to the sword. This was an exercise of the extreme right of war, and justified on the ground of necessity, as the hostility and continued resistance of the inhabitants of the conquered place would otherwise prevent the conqueror from pursuing his military operations, for the purpose of securing the object of the war. But, in more civilised ages, when a place is taken by one of the belligerents, and the people lay down their arms, they are allowed to continue their ordinary peaceful occupations, without hindrance or restraint, but with the tacit or implied agreement, that they will oppose no further resistance to the power of the conqueror. They are virtually in the condition of prisoners of war on parole. No word of honour has been given, but it is implied; for only on that condition would the conqueror have relinquished the extreme right of war which he held over their lives, and have suffered them freely and peacefully to pursue their ordinary avocations. But this implied obli-

[1] Vattel, *Droit des Gens*, liv. iii. ch. viii. §§ 163–140; Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. §§ 1, 2; Lieber, *Political Ethics*, b. iii. ch. i. § 1.

gation does not bind those who remain in arms, or those who are retained as prisoners of war; *their* right of resistance continues. It is only those who enjoy the favours of the conqueror, by a relaxation of the right of war for their benefit, that are tacitly bound by the acceptance of such favours. If they decline the favour, they do not assume the obligation. Thus, a prisoner of war who refuses to give his *parole* may kill his guard and effect his escape, without any violation of the laws of war, or the obligations of honour and morality.[1]

Of the conqueror

§ 17. It must also be observed, that this tacit agreement is mutual and equally binding upon both parties. If the conquered are under the implied obligation to make no further resistance to the conqueror, it is only in consideration of the favours and privileges they are to derive from a relaxation of the extreme rights of war, by being allowed peacefully to pursue their ordinary occupations, without any further restraint than may be necessary for the safety of the conqueror. But if the conqueror should impose unusual and unnecessary restraints, should treat them with unmerited harshness, should destroy or confiscate their property, taking away the liberty of some and the lives of others,—such conduct on his part would release them from the obligation of non-resistance, and restore to them the rights of belligerents in actual war. Insurrections, in such cases, are justified by the law of necessity and the natural right of protecting life, liberty, and property.[2]

Right of revolution

§ 18. The abstract question of the right of a people to take up arms against the authorities of an established government, has often been discussed by speculative writers. However opposed it may be to the general theory of political organisation and government, it can hardly be doubted that a revolution, in certain circumstances, would be justifiable.

[1] Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. viii.; Heffter, *Droit International*, §§ 119–124.

Attacks by or with the presumed aid of the French inhabitants were never left unpunished by the Germans, in the war of 1870. At Mézières, near Nantes, half a village was consumed, because a parting shot was fired at some Bavarians. At Foucancourt a third of the houses were consumed, because the inhabitants were accused of being in collusion with some francs-tireurs, who had fired on the Germans at the entrance to the village, under cover of a thick fog. Vernon (on the road to Rouen), though an open town, was shelled by the Germans, because some gamekeepers had fired at them across the river, and the bridges being broken they could not recross. (Edwards, *supra*, p. 437.)

[2] Lieber, *Pol. Ethics*, b. iii. ch. i. § 1; b. iv. ch. ii. § 29; Abegg, *Untersuchungen*, p. 86; Heffter, *Lehrbuch des Criminalrechtes*, § 37.

But in what circumstances? Here opinions diverge, and doubts and difficulties increase as we advance, till all hope of a satisfactory conclusion is lost. Abandoning, then, all chance o f deciding what constitutes justifiable causes of civil revolutions, we must judge of them by their effects. If we turn to history, we find that they form some of its brightest and some of its darkest pages. Sometimes nations have been benefited by them, and sometimes they have proved the utter ruin of whole States. While, therefore, the right of revolution is opposed by the jurisconsult on technical grounds, and admitted by the philosopher on the ground of necessity, all agree that such a terrible rupture of the framework of civil society should be resorted to only where all other means of redress have failed. 'Governments, long established, should not be changed for light and transient causes. . . . But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under an absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.'[1]

Military insurrections

§ 19. The right of insurrection in war, therefore, rests upon the same principle as the right of revolution against an established government. The general duty of obedience to the laws, results from the protection they afford to the lives and property of the citizens and subjects; but when a civil government fails to afford that protection, and obstinately persists in a course injurious to the people, and when the probable evils accompanying the change are not greater than the blessings to be obtained by it, revolution becomes a duty as well as a right. So, also, with respect to the military government of occupation established by the conqueror; its course may be so injurious to the conquered people as to render submission intolerable, and to justify them in resorting to the necessary but cruel alternative of insurrection. The principle is plain and clear, but there is great difficulty in its application to particular cases. The historians of the conquered power almost invariably justify such insurrections on the score of patriotism, while those of the opposite party as uniformly

[1] Vattel, *Droit des Gens*, liv. iii. ch. xviii. §§ 290, 291; Taylor, *On Revolutions*, passim; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. ii. ch. vi.; *Declaration of American Independence*; *Encyclopædia Americana*, verb. 'Insurrection.'

condemn them as in violation of the laws of war, and the implied obligation of submission; as, in revolutions, success or failure usually gives to a military insurrection the popular character of patriotic resistance, or of a cruel and unjustifiable sacrifice of human life.[1]

Punishing military insurrections

§ 20. As the conquered inhabitants, in a military insurrection, throw off all implied obligations of submission to the authority of the conqueror, and resort to the extreme rights of war, it follows that the conqueror may, in such a case, resume towards the insurgent enemy the severe and extreme rights of the same code over life and property. The insurgents taken in arms, as well as their instigators, may therefore be put to death, and their property confiscated or destroyed. But this extreme right of the conqueror over military insurgents is limited by the laws of humanity, and he is not justified if he resort to cruel and unnecessary punishments. Hence, in modern wars, only the leaders and instigators of a military insurrection are usually punished with death, while the common people who are engaged in it are more leniently dealt with. Sometimes heavy contributions are levied by way of punishment upon the place or district of country where the insurrection occurs. This practice is justified on the ground that the instigators and leaders, being usually the originators of the insurrection, should suffer the punishment due to the offence, and that a community is to be held responsible for the acts of its members where the individual offenders cannot be otherwise reached. But as there is no legal tribunal to determine upon the justice of a war, neither is there one to determine upon the cause of a military insurrection, or the justice of the punishment imposed upon the insurgents. But there is a tribunal of public opinion to which all are subject.[2]

Historical examples

§ 21. History abounds in examples of insurrection, and of punishments inflicted by the conqueror upon insurgents. Without recurring to the wars of the Middle Ages, of the Reformation, of Charles V., Louis XIV., and Frederick II., before the principles of international law were fully established or generally recognised, we find numerous examples in the wars of Buonaparte, in Europe, and of the English, in India.

[1] Abegg, *Untersuchungen*, &c., p. 86; Lieber, *Political Ethics*, b. iv. ch. iii. 28; Alison, *Hist. of Europe*, vol. i. pp. 405, 468.

[2] *Vide ante*, ch. xx. and xxi.; Vattel, *Droit des Gens*, liv. iii. ch. xviii. §§ 290, 291; Berbeyrac, *Note sur Puffendorf*, tome ii. p. 474.

A few illustrations drawn from the wars of Napoleon will suffice for our purpose. In the Italian campaign of 1796, the inhabitants of Pavia rose against the French troops, and made them prisoners. Lannes routed a portion of the insurgents, and burnt the village of Brescia; but, as this severe example failed in producing intimidation, Napoleon himself returned to the revolted city, shot the leaders of the insurrection, and delivered up the place to plunder. 'This terrible example,' says the English historian, 'crushed the insurrection over the whole of Lombardy.' In the campaign of 1797, a Venetian insurrection was organised on the Adige; four hundred wounded French in the hospital of Verona were killed in cold blood, and the French garrison of Fort Chiusa, which capitulated for want of provisions, was inhumanly put to death. The insurrection was immediately suppressed, its authors shot, and a contribution of one million one hundred thousand francs levied on the city. In the Peninsular war many of the Spaniards and Portuguese, after submitting to the French, took advantage of every opportunity to rise upon a small garrison or detachment, and to murder all stragglers. They were punished with severity. 'So many complaints,' says Napier, 'were made of the cruelty committed by Massena's army while at Santarem, that Lord Wellington had some thoughts of reprisals; but having first caused strict enquiry to be made, it was discovered that, in most cases, the *ordenanças*, after having submitted to the French, and received their protection, took advantage of it to destroy the stragglers and small detachments, and the cruelty complained of was only the infliction of legitimate punishment for such conduct; the projected retaliation was therefore changed for an injunction to the *ordenanças* to cease from such a warfare.'[1]

Alienations of territory occupied by an enemy

§ 22. Military occupation, as has already been stated, suspends the sovereignty and dominion of the former owner so long as the conquered territory remains in the possession of the conqueror, or in that of his allies. The temporary dominion of the latter completely excludes, for the time being, the original dominion of the former. The vanquished sovereign, therefore, has no power, as against the conqueror, to alienate

[1] Napier, *Hist. Peninsular War*, vol. ii. p. 451; Jomini, *Des Guerres de la Révolution*, ch. lxxiii.; Thiers, *Révolution Française*, tome viii. ch. iv.; tome ix. ch. ii.; Alison, *Hist. of Europe*, vol. i. pp. 405, 468; Napoleon, *Mémoires*, tome iii. p. 195; tome iv. p. 149.

any part of his own territory which may be at the time in the possession of the latter. If the conquest be completed, or confirmed, the title passes to the conqueror precisely as it was when the latter first acquired the possession. No other party can claim any rights over it arising from any conveyance or transfer from the vanquished while it was in the conqueror's possession. But, if it be surrendered up to the former owner, or recovered by him, such conveyances would become valid, for the alienor would not be permitted to deny his own act. It is a principle of jurisprudence that the *jus ad rem* (the possession of) and the *jus in re* (the right to) the thing alienated are necessary in the grantor in order to constitute a complete title. During military occupation these exist together neither in the original owner nor in the conqueror. The title conveyed by either is therefore imperfect; if, by the former, it is made good by a restoration of the conquest; and if, by the latter, it is completed by a confirmation of the conquest, whether by treaty or by any other mode recognised in international law.[1]

Alienations made in anticipation of conquest

§ 23. But if war be declared and actually commenced, and one of the belligerents has made manifest his intention to effect the permanent acquisition of a particular portion of the territory of the other (which intention is afterwards accomplished by actual conquest), and after the declaration of such intention, and while preparation is being made to carry it out, the original owner alienates that territory, in whole or in part, is the conqueror bound to regard such alienation as a valid transfer, or may he disregard it *in toto*, as being an illegal attempt to deprive him of the rights of war? In other words, did not his avowed determination to effect the permanent acquisition of such territory, his preparation to make the conquest, and his ability to effect it, as proved by the result, give to the conqueror some incohate or inceptive right to the territory subsequently conquered; or did they not at least suspend the right of the original owner to alienate it? In order to obtain a satisfactory solution of this question, we will recur to fundamental principles. The rights of conquest are derived from *force* alone. They begin with possession, and end with the loss of possession. The

[1] The 'Flotina,' 1 *Dod. R.*, 450; the 'Fama,' 5 *Rob.*, 97; Grotius, *De Jure Bell. ac Pac.*, lib. ii. ch. vi. § 1; Puffendorf, *De Jure Nat. et Gent.*, lib. iv. ch. ix. 8.

possession is acquired by force, either from its actual exercise, or from the intimidation it produces. There can be no antecedent claim or title, from which any *right* of possession is derived: for if so, it would not be a *conquest*. The assertion and enforcement of a *right* to possess a particular territory do not constitute a *conquest* of that territory. By the term conquest, we understand the *forcible* acquisition of territory admitted to belong to the enemy. It expresses, not a *right*, but a *fact*, from which rights are derived. Until the fact of conquest occurs, there can be no rights of conquest. A title acquired by a conquest cannot, therefore, relate back to a period anterior to the conquest. That would involve a contradiction of terms. The title of the original owner prior to the conquest is, by the very nature of the case, admitted to be valid. His rights are, therefore, suspended by force alone. If that force be overcome, and the original owner resumes his possession, his rights revive, and are deemed to have been uninterrupted. It, therefore, cannot be said, that the original owner loses any of his rights of sovereignty, or that the conqueror acquires any rights whatever, in the conquered territory, anterior to actual conquest. The former are suspended by, and the latter derived from, the *fact* of conquest, and, in order to determine the date of such suspension or acquisition of rights, we must refer to the fact of conquest, and not to any prior intention or determination of the conqueror. If these propositions be true, it follows that grants to individuals made, after the commencement of hostilities, by the original sovereign of lands lying in territory, of which he still retains the dominion and ownership, rest upon the same foundation as those made before the war. If the title thus conveyed is, by municipal law, complete and perfect, the land becomes private property, and must be so regarded by the conqueror. If it be incohate and imperfect, but *bonâ fide* and equitable, it nevertheless constitutes 'property' in the sense in which that term is used in international law. It is true that, by the extreme rights of war, the conqueror may disregard individual ownership, and take private property and convert it to his own use. But such a proceeding, as has already been said, is contrary to modern practice, and cannot be resorted to, except in particular cases and under peculiar circumstances. As neither actual hostilities, nor a formal declaration of war,

can suspend or terminate the sovereignty of the original owner, he retains and may exercise his dominion over every portion of his territory, till actual conquest.[1]

Private grants so made

§ 24. But suppose that the vanquished power, while the conqueror is actually taking forcible possession of a part of its territory, should send its agent with the retreating army, and, as the hostile force advances its standard from district to district, should deliver to individual subjects title-deeds of the territory at the moment it was about to fall into the possession of the advancing foe, with the evident intention to deprive him of the fruits of his conquest. Must the conqueror recognise such grants as valid; and if not, how shall he draw the line of distinction between them and other titles issued by the same authority after the commencement of hostilities and before actual conquest? The want of good faith on the part of such grantees, as well as on the part of the grantor, would deprive them of the rights of *bonâ fide* purchasers. The distinction between such titles and those acquired in good faith and granted in good faith, and in the ordinary exercise of the rights of original sovereignty, is abundantly manifest. The *fraudulent intent* vitiates the entire transaction, and renders the titles mere nullities, and the conqueror, both during military occupation and after complete conquest by the cessation of hostilities, may refuse to recognise them, unless by some express treaty stipulation he has agreed to regard them as valid. But it must be observed that the same rule applies to grants made prior to the war if not *bonâ fide*, the conqueror is not bound to recognise them as valid. The fact of the conqueror being in possession of a part of the country, or even of its capital, produces no effect upon the part which remains in the possession of the former sovereign. This question has been discussed in another section.[2]

Transfer of territory to neutrals

§ 25. Again, suppose a belligerent should, after a declaration of war, and in anticipation that a particular portion of its territory will necessarily fall into the power of the other party, transfer it to a neutral for the manifest purpose of depriving his enemy of an opportunity to acquire it by con-

[1] Bouvier, *Law Dictionary*, verb. 'Conquest;' Phillimore, *On Int. Law*, vol. iii. § 223; Vattel, *Droit des Gens*, liv. ii. ch. xiii. § 197.

[2] Mass *v.* Riddle and Co., 5 *Cranch. R.* 357.

quest: is the latter bound to recognise the validity of such transfer? Every sovereign and independent State has an undoubted right to alienate any part of its own territory, so long as it retains the ownership and dominion; and other sovereign States have an equal right to acquire such ownership and dominion by any of the modes recognised in international law. But a mere treaty cession of a province or territory by one power to another, can never operate, by itself, as an immediate and complete transfer of the ownership and dominion of the land, or of the allegiance of its inhabitants. To produce such effect, a solemn delivery of the possession by the ceding power, and an assumption of the dominion and government by that to which the cession is made, are indispensable. Until then, the territory continues to belong to the original sovereign owner, and its inhabitants remain the subjects of the power to which their allegiance was due prior to such treaty cession. Such ceded territory is, therefore, still liable to conquest as the territory of the enemy. But suppose the transfer be completed by a formal delivery of the possession to the neutral grantee, and the assumption by him of the dominion and government of the ceded territory? If the transaction is evidently *malâ fide* and the transfer is made with the manifest intent to defraud the belligerent of the rights of conquest, the pretended ownership of the neutral sovereign will not be recognised by the conqueror. Moreover, such an attempt on the part of a neutral to hold territory for the benefit of one of the parties to a war, and in fraud of the belligerent rights of the other party, is regarded as a violation of neutral duty, and as an act of hostility toward the party whose rights he thus attemps to defeat. Such transfers of territory by a belligerent to a neutral are mere nullities, for fraud vitiates the transactions of States as well as of individuals. But the general right of neutrals to purchase the property of belligerents, *flagrante bello*, if the sale be *bonâ fide*, is universally conceded. The character of each transaction must be decided upon its own merits, and the determination of the question belongs to the political power of the State. Although the transfer may have been made with the evident intent to defraud the belligerent of the rights to which he is entitled by the laws of war, nevertheless policy may induce him to treat it as a *bonâ fide* transaction, rather

than to involve himself in hostilities with the pretended purchaser.[1]

Effect of military occupation on incorporeal rights

§ 26. We have next to consider the effect of military occupation upon incorporeal things and rights, as debts, &c. Of these it has been justly remarked: 'They cannot in themselves be the subject of actual possession; they are not external things on which the conqueror can lay his armed hand. They are rights which exist in mental apprehension as connected with a given subject to which they are attached, and with a material object upon which they can be exercised. Therefore the Roman law philosophically said, *ipsum jus obligationis incorporale est*, and again, *nec possideri videtur jus incorporale*.' It is, therefore, only by the actual possession of corporeal things to which the incorporeal right attaches that the conqueror can be considered as occupying the latter; but, if he possess himself of the former, he is considered to be in possession of both. A distinction, however, is made between incorporeal rights attached to a *corporeal thing* and those attached to a *person*. Man, it is said, as the subject of rights, cannot be compared to a thing; his rights do not, so to speak, hang upon him as they hang upon a piece of land; they rather proceed from him; they constitute his intellectual or spiritual property, which cannot, by the agency of what Grotius calls a *nudum pactum*, be separated, without his consent, from his person. It follows, therefore, that when a person to whom certain rights belong is captured by an enemy, such capture gives to the captor only the corporeal and actual things in the possession of the prisoner; the possession of the creditor's person does not give a *jus exigendi* of his debts. It therefore follows, that incorporeal things, such as debts, do not accrue to the conqueror as a consequence of his possession of the person who is entitled to them. The rule was somewhat different when prisoners of war were made slaves. But may not debts accrue to the conqueror from his possession of the instruments or documents which contain the legal statement of the obligation of the obligor, as promissory notes, mortgages, &c.? We have shown in a preceding chapter that such documents are only *evidences* of debts, but not the debts them-

[1] Heffter, *Droit International*, § 131; Duer, *On Insurance*, vol. i. pp. 437, 438; the 'Fama,' 5 *Rob*, 97; the 'Johanna Emelia,' 29 *Eng. Law and Equity*, *R*, 562; Cushing, *Opinions of Attys.-Gen.*, vol. vi. p. 638.

selves, and that the mere fact of their possession does not of itself authorise the possessor to exact payment from the promisor. The original creditor may be entitled to recover his debt though these instruments be lost or destroyed.[1]

Debts due to the displaced government

§ 27. We will next consider the effect of a military occupation of a State upon debts owing to its government. Does such conquest of the State carry with it the incorporeal rights of the State, such as debts, &c.? In other words, do these rights so attach themselves to the territory that the military possession of the latter carries with it the right to possess the former? There are two distinct cases here to be considered: *first*, where the *imperium* of the conqueror is established over the *whole* State (*victoria universalis*); and *second*, where it is established over only a *part*, as the capital, a province, or a colony (*victoria particularis*). As has already been stated, all rights of military occupation arise from *actual* possession, and not from constructive conquests; they are *de facto*, and not *de jure* rights. Hence, by a conquest of part of a country, the government of that country, or the *State*, is not in the possession of the conqueror, and he, therefore, cannot claim the incorporeal rights which attach to the whole country as a *State*. But, by the military possession of a part, he will acquire the same claim to the incorporeal rights which attach to that part, as he would, by the military occupation of the whole, acquire to those which attach to the whole. We must also distinguish with respect to the situations of the debts, or rather the locality of the debtors from whom they are owing, whether in the conquered country, in that of the conqueror, or in that of a neutral. If situated in the conquered territory, or in that of the conqueror, there is no doubt but that the conqueror may, by the rights of military occupation, enforce the collection of debts actually due to the displaced government, for the *de facto* government has, in this respect, all the powers of that which preceded it. But if situated in a neutral State, the power of the conqueror, being derived from force alone, does not reach them, and he cannot enforce payment. It rests with the neutral to decide whether he will, or will not,

[1] *Digests*, i. t. viii. 1; xli. t. iii. 4, § 27; xli. t. ii. 3; Brunleyer, *Dis. de Occupatione Bellica*, Argent, 1702; Pfeiffer, *Das Recht der Kriegseroberung*, &c., pp. 44–60; Phillimore, *On Int. Law*, vol. iii. §§ 545 548; Burlamaqui, *Droit de la Nat. et des Gens*, tome v. pt. iv. ch. iii. § 14.

recognise the demand as a legal one, or, in other words, whether he will regard the government of military occupation as sufficiently permanent to be entitled to the rights of the original creditor. He owes the debt, and the only question with him is, who is entitled to receive it? In deciding this question he will necessarily be determined by the particular circumstances of the case, and will probably delay his action till all serious doubts are removed.[1]

If former government be restored

§ 28. If the debt, from whomsoever owing, be paid to the government of military occupation, and the conquest is afterward made complete, no question as to the legality of the payment can subsequently arise. But should the former sovereign or government, after a lapse of time, be restored, and the debtor receive his discharge, may the original creditor demand a second payment? The burthen of proof, in such a case, lies upon the debtor; and in order to render the payment valid, and make it operate as a complete discharge of the debt, he must show: 1st, that the sum was actually paid, for an acquittance or a receipt, without actual payment, is no bar to the demand of the original creditor; 2nd, that the debt was actually due at the time when it was paid; 3rd, that the payment has not been delayed by a *mora* on the part of the debtor, which had thus operated to defeat the claim of the original creditor. If the debtor be a citizen of the conquered country, or a subject of the conqueror, he must also show: 4th, that the payment was compulsory—the effect of a *vis major* upon the debtor—not necessarily extorted by the use of physical force, but paid under an order, the disobedience of which was threatened with punishment. If the debtor be a neutral or stranger, he cannot plead compulsion as a justification of his making payment to the conqueror, but he must also show: 5th, that the constitutional law of the State recognised the payment, as made by him, to be valid; in other words, that it was made in good faith, and to the *de facto* authority authorised by the fundamental laws to receive it. It is not a necessary condition, but it is a substantive defence against the original creditor, that the money has been applied to his benefit; thus, in the case of a State

[1] Réal, *Science du Gouvernement*, tome v. ch. ii. § 5; Wolfius, *Jus Gentium*, cap. vii. §§ 833, 864; Vattel, *Droit des Gens*, liv. iii. ch. xiv § 213; Lauterbach, *Colleg. Pandect.*, lib. xlix. t. xv. § 7.

creditor, if the money has been applied to the benefit of the State—if there has been what the civilians term a *versio in rem*—the payment will be regarded as valid.[1]

Examples from ancient history

§ 29. The earliest historical example of the effect of military occupation or conquest, on the payment or cancelling of debts due to the conquered State, is that of the hundred talents borrowed by the Thessalonians from Thebes, and remitted by Alexander, as has been stated in chapter xxi. This case, however, belongs rather to complete conquests, than to mere military occupation; for the debt not being paid, but remitted, as a *gift*, the validity of the gift could be sustained only on the ground that Alexander had become so entirely and absolutely master of Thebes, as to constitute him the heir and universal successor to the defunct and extinguished State. In the civil war between Cæsar and Pompey, the former remitted to the city of Dyrrachium the payment of a debt which it owed to Caius Flavius, the friend of Decius Brutus. The jurists who have commented on this transaction, agree that the debt was not legally discharged: 1st, because in a civil war there could be, properly speaking, no *occupation*; and 2nd, because it was a private and not a public debt. Another classical example was that of the confiscation of Rhodian houses and debts within the Syrian dominions, by Antiochus, king of Syria; but this was settled by the peace which provided for the *status quo ante bellum*.[2]

Examples from modern history

§ 30. The first example in modern times, referred to by jurists, occurred in 1349. A Fleming lent a Frenchman a thousand crowns; the latter contrived to delay the payment until war broke out between Flanders and France, and then paid the money into the French treasury. After the peace the Fleming again demanded his debt, but the Frenchman defended himself by alleging the payment to the royal treasury. He, however, was condemned to pay back so much of the thousand crowns as he should be proved to have expended to his own benefit; in other words, the court of his own country relieved him only to the extent of the sum actually paid

[1] Phillimore, *On Int. Law*, vol. iii. §§ 157, 158; Kluber, *Europ. Völkerrecht*, §§ 258, 259; J. Voet, *Com. ad Pandectas*, lib. xix. tit. ii. § 28.

[2] Quintilian, *Inst. Orat.*, lib. v. cap. x.; Albericus Gentilis, *De Jure Belli*, lib. iii. cap. v.; Cocceius, *Grotius Illustratus*, t. iii. pp. 202, 236; Polybius, *Histor. Excerptæ Legationes*, cap. xxxv.; Tittman, *Ueber den Bund des Amph.*, p. 135; Kamptz, *Literatur*, &c., § 307.

to the sovereign of the debtor. The fraudulent *mora* does not seem to have entered into the judicial investigation of this case. In a war between Pisa and Florence, toward the close of the fifteenth century, the former compelled, by threats of punishment, its subjects, who were debtors to Florentine subjects, to pay their debts into the Pisan treasury. A Pisan debtor, named Ludovicus, who had so paid his debt, was nevertheless sued for it by his Florentine creditor; the question was referred to Philip Decius, a Milanese jurist of the highest reputation, who, reciting the premises, concludes: 'Ex quibus omnibus concludo et indubitanter existimo, quod Ludovicus mediante tali solutione fuerit liberatus.' In the year 1495, when Charles VIII. of France overran Italy, and temporarily replaced the house of Anjou upon the throne of Naples, the debts due to the State from the opposite faction were called in, as a means of enriching the Angevin party. Some of the debtors paid honestly the full amount of their debts; others paid a portion, and obtained a receipt in full; others again obtained a written discharge, without paying anything. Four months afterwards, Ferdinand of Aragon was restored to power, and the French and Angevins driven out; and the validity of these payments and receipts was sharply contested. The opinion of Matthæus de Afflictis, a jurist of the highest authority, was invoked, which concluded in the following words: '*Prima conclusio*, quod illi debitores regum de Arragoniâ, qui fuerunt in morâ solvendi dictis regibus pecuniam debitam in genere, et jussu regis Caroli et suorum officialium solverunt ipsis donatariis, *non sunt liberati*, et tenentur solvere dictis regibus, veris creditoribus. *Secunda conclusio* sit ista, quod illi debitores qui non fuerunt in morâ solvendi dictis creditoribus, sed jussi fuerunt ab officialibus regis Franciæ, quod solvant illis Gallis, virtute largitatis regis, et ipsi fecerunt, quidquid eis fuit possibile, ut non solverent, et realiter eis solverunt propter jussum pœnalem, et isti *sunt liberati*. *Tertia conclusio* sit ista, quod si debitor fuit in morâ, sed erat infra tempus purgandi moram, et infra illud tempus sit exactus ab illis Gallis jussu magistratus, tunc solvendo Gallis perinde habetur ac si non esset in morâ, et sic *erit liberatus*. *Quarta conclusio* sit ista, quod debitor, qui solvit Gallis illam pecuniam debitam regibus de Arragoniâ virtute jussus magistratus, cui non potuit resistere, et pecuniam illam debitam

post diem solutionis faciendæ erat solitum, quod ipsi debitores penes se retinebant pro expensis occurrentibus in administratione officii nomine regio, si ipsam pecuniam Gallis solverunt, *sunt liberati*, etiam quod fuerint in morâ. *Quinta conclusio* sit ista, quod illi debitores, qui solutionem probant per confessionem Gallorum publicam vel privatam, ita quod non probant veram numerationem pecuniæ eis factam, *non sunt liberati*, sed debent solvere veris creditoribus, quantumcunque ostenderint dictum jussum. *Sexta conclusio*, quod illi debitores, qui se concordaverunt, et non ostendunt veram solutionem in totum vel in partem, *non sunt liberati*. Exitus rei approbavit istas conclusiones.' The case of the debtors of the Prince of Hesse-Cassel, which has furnished such a fruitful subject for discussion by modern jurists, belongs rather to complete conquests than mere military occupation, and will, therefore, be considered in the next chapter. The only additional case in modern times, to which we shall here refer, occurred during the war between the United States and the republic of Mexico. The Messrs. Laurents, British subjects domiciled in Mexico, had purchased of the Mexican government, in 1847, certain church property, the sale of which had been previously authorised by a law of the Mexican Congress. The contract of sale was duly signed by the Laurents as purchasers, and by the agents of the government as the sellers, and the purchase money deposited in the hands of a banker, to await the execution of the conveyance by the proper government officer. By some neglect the instrument had not been signed, but the purchasers were in possession of the property, and the money still remained on deposit when the city of Mexico was captured by the American forces. This money was seized and confiscated by General Scott as the property of the Mexican government. On the return of peace the church reclaimed the property, and, on suit, recovered its possession from the Messrs. Laurents, not on the ground of a default of payment, but of illegality of sale. The Laurents then made a reclamation against the United States for the money confiscated, as British subjects, before the joint commission of the two governments. The commissioners being unable to agree, the case was referred to the umpire, who decided that, according to the rules of international law, the claimants were, at least for the time

being, to be regarded as Mexican citizens, and not British subjects. Their claim was, therefore, rejected.[1]

[1] Paponius, *Recueil d'Arrêts*, liv. v. tit. vi. Arrêt 2; Phillimore, *On Int. Law*, vol. iii. §§ 565–569; *Commission of Claims between U. S. and G. Britain*, pp. 120–160; Philip Decius, *Consilia*, cap. xxv.; Matthæus de Afflictis, *Decisiones Nap.*, Dec. 150; Pfeiffer, *Das Recht der Kriegseroberung*, pp. 191, 192.

CHAPTER XXXIV

RIGHTS OF COMPLETE CONQUEST

1. Conquests, how completed—2. Acquisition of parts of a State—3. Subjugation of an entire State—4. Retroactive effect of confirmation of conquest—5. Transfer of personal allegiance by conquest—6. The assent of the subject required—7. Such assent determined by domicile—8. Case of Hallemund—9. Application to naturalised citizens and foreign subjects—10. Rule varied by treaty and by municipal law—11. Right to citizenship under new sovereignty—12. English law on this subject—13. American decisions—14. Laws of the conquered territory—15. Conquered territory under British laws—16. Under the United States—17. Laws of conquered State, how affected by the new sovereignty—18. How affected by laws of military occupation—19. What laws of new sovereignty extend over it—20. Conquests and discoveries—21. Laws contrary to fundamental principles of new sovereignty—22. American decisions—23. Revenue laws in California—24. Conquest changes political rights, but not rights of property—25. Title to private estate—26. Necessity of remedial laws for such titles—27. Effect of conquest on the property of the State—28. Alienated domains of Hesse-Cassel—29. Debts of Hesse-Cassel.

Conquests, how completed

§ 1. As already remarked, the conqueror's title to immovable property taken from the enemy, may be completed in various ways, as by a treaty of peace or of cession, by entire subjugation and the incorporation with the conquering State, by civil revolution and the consent of the inhabitants, or by the mere lapse of time and the inability of the former sovereignty to recover its lost possessions. We will proceed to consider these different modes of confirmation. The title to conquered territory is made complete by a treaty of peace, either by express provisions of cession, or by the implied condition of *uti possidetis*.[1] If the stipulation of cession is introduced in the treaty, it is usual to require of the conqueror certain stipulations with respect to the inhabitants of the ceded conquered territory, in order to secure to them rights not guaranteed by the positive law of nations. But the conqueror's title is equally made complete by the silent operation of a general treaty of

[1] Clark *v.* United States, 3 *Wash. C. C.*, 101.

peace, for, as the principle of *uti possidetis* is the basis of every such treaty, unless the contrary is expressed, the conquered territory remains with the conqueror, and his title cannot afterwards be called in question. But a treaty is not the only mode in which the rights of conquest are confirmed and made valid. If the State to which the conquered territory belonged is entirely subjugated, and its power destroyed, the title of the conqueror is considered complete from the date of the subjugation of the former sovereign owner. In this case there could be no treaty of cession or confirmation, for, by supposition, the former owner no longer exists as a Sovereign State; it, therefore, can neither confirm nor call in question the conqueror's title. So, also, if the State to which the conquered territory belonged be so weakened by the war as to afford no reasonable hope of ever being able to recover its lost territory, but, from pride or obstinacy, it refuses to make any formal treaty of peace, although destitute of the requisite means of prolonging the contest, the conqueror is not obliged to continue the war in order to force the other party into a treaty. He may content himself with the conquest already made, and annex it to, or incorporate it with, his own territory. His title will be considered complete from the time he proves his ability to maintain his sovereignty over his conquest, and manifests, by some authoritative act, as of annexation or incorporation, his intention to retain it as a part of his own territory. Both of these requisites—*ability to maintain* and *intention to retain*—are necessary to complete the conquest; and the latter must be manifested by some unequivocal act, as annexation or incorporation, made by the sovereign authority of the conquering State. Without some such authoritative act, the conquered territory is held by the rights of military occupation only, and not as a complete conquest. So far as neutrals are concerned, it belongs to the conquering State, but does not form a part of it. It is held by the right of possession and not by complete title, and is therefore subject to the [illegible] of postliminy. Again, if the conquest be accompanied [illegible] revolution and a change of internal government, as [illegible] colony or province revolts against the former sovereign, with the assistance of the conqueror, establishes its [illegible] pendence, and unites itself to the conqueror, the sovereignty of the former owner may be regarded as extinguished

by the act of separation, independence and voluntary annexation or incorporation, and without a treaty of peace, or of cession. The new internal government so organised and recognised, acts for itself, independently of its former sovereign. Such cases, however, are of rare occurrence. In whatever way the conquest is completed, the institutions of the conquering power usually require some definitive act in order to annex or incorporate the conquered territory, so as to complete the conquest and perfect the title. In such cases no alienation to a third party can be made complete till the conquest itself is perfected by such definitive act. Thus, the President of the United States, when war is duly declared, may conquer and take possession of foreign territory, but the joint action of the President and Senate is required to complete it by treaty, and Congress alone can annex it, or incorporate it into the Union. Without such act of treaty confirmation, or of lawful annexation or incorporation, the title to any conquest made by the United States would still be considered in international law as incomplete.[1]

Acquisition of parts of a State

§ 2. The conqueror who acquires a province or town from the enemy, acquires thereby the same rights which were possessed by the State from which it is taken. If it formed a constituent part of the hostile State, and was fully and completely under its dominion, it passes into the power of the conqueror upon the same footing. It is united with the new State upon the same terms on which it belonged to the old one; that is, with only such political rights as the constitution and laws of the new State may see fit to give it. It retains no political privileges or immunities, but may acquire those it never possessed before. In political rights it may be the gainer or the loser by the change; if from being a part of an absolute monarchy it becomes a part of a republic, its liberties will be enlarged, or, if the reverse, they will be restricted. But such restriction, in any case, must be in conformity with the rights of conquest and the laws of war. When New Mexico

[1] Wheaton, *Elem. Int. Law*, pt. ii. ch. iv. § 5; Fleming et al. *v.* Page, 9 *Howard R.*, 603; Heffter, *Droit International*, §§ 69, 133, 178, 185; Phillimore, *On Int. Law*, vol. iii. §§ 568 et seq.; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. xii.; Meerman, *Von dem Recht der Eroberung*, passim; Kluber, *Droit des Gens Mod.*, § 256; Martens, *Précis du Droit des Gens*, § 277; Sirey, *Recueil*, &c., xvii. 1, 217: xxx. 1, 280; the 'Boedes Lust,' 5 *Rob.*, 233; the 'Flotina,' 1 *Dod. R.*, 450.

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peace, for, as the principle of *uti possidetis* is the basis of every such treaty, unless the contrary is expressed, the conquered territory remains with the conqueror, and his title cannot afterwards be called in question. But a treaty is not the only mode in which the rights of conquest are confirmed and made valid. If the State to which the conquered territory belonged is entirely subjugated, and its power destroyed, the title of the conqueror is considered complete from the date of the subjugation of the former sovereign owner. In this case there could be no treaty of cession or confirmation, for, by supposition, the former owner no longer exists as a Sovereign State ; it, therefore, can neither confirm nor call in question the conqueror's title. So, also, if the State to which the conquered territory belonged be so weakened by the war as to afford no reasonable hope of ever being able to recover its lost territory, but, from pride or obstinacy, it refuses to make any formal treaty of peace, although destitute of the requisite means of prolonging the contest, the conqueror is not obliged to continue the war in order to force the other party into a treaty. He may content himself with the conquest already made, and annex it to, or incorporate it with, his own territory. His title will be considered complete from the time he proves his ability to maintain his sovereignty over his conquest, and manifests, by some authoritative act, as of annexation or incorporation, his intention to retain it as a part of his own territory. Both of these requisites—*ability to maintain* and *intention to retain*—are necessary to complete the conquest ; and the latter must be manifested by some unequivocal act, as annexation or incorporation, made by the sovereign authority of the conquering State. Without some such authoritative act, the conquered territory is held by the rights of military occupation only, and not as a complete conquest. So far as neutrals are concerned, it belongs to the conquering State, but does not form a part of it. It is held by the right of possession and not by complete title, and is therefore subject to the rights of postliminy. Again, if the conquest be accompanied by a civil revolution and a change of internal government, as where a colony or province revolts against the former sovereign, and, with the assistance of the conqueror, establishes its own independence, and unites itself to the conqueror, the sovereignty of the former owner may be regarded as extinguished

by the act of separation, independence and voluntary annexation or incorporation, and without a treaty of peace, or of cession. The new internal government so organised and recognised, acts for itself, independently of its former sovereign. Such cases, however, are of rare occurrence. In whatever way the conquest is completed, the institutions of the conquering power usually require some definitive act in order to annex or incorporate the conquered territory, so as to complete the conquest and perfect the title. In such cases no alienation to a third party can be made complete till the conquest itself is perfected by such definitive act. Thus, the President of the United States, when war is duly declared, may conquer and take possession of foreign territory, but the joint action of the President and Senate is required to complete it by treaty, and Congress alone can annex it, or incorporate it into the Union. Without such act of treaty confirmation, or of lawful annexation or incorporation, the title to any conquest made by the United States would still be considered in international law as incomplete.[1]

Acquisition of parts of a State

§ 2. The conqueror who acquires a province or town from the enemy, acquires thereby the same rights which were possessed by the State from which it is taken. If it formed a constituent part of the hostile State, and was fully and completely under its dominion, it passes into the power of the conqueror upon the same footing. It is united with the new State upon the same terms on which it belonged to the old one; that is, with only such political rights as the constitution and laws of the new State may see fit to give it. It retains no political privileges or immunities, but may acquire those it never possessed before. In political rights it may be the gainer or the loser by the change; if from being a part of an absolute monarchy it becomes a part of a republic, its liberties will be enlarged, or, if the reverse, they will be restricted. But such restriction, in any case, must be in conformity with the rights of conquest and the laws of war. When New Mexico

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formed a part of the Mexican Republic, it enjoyed the right of representation in the Mexican Congress; on the conquest of that territory by the arms of the United States, under Gen. Kearny, a clause was introduced into the new organic law for sending a representative to the Congress of the United States. This part of the organic law was disapproved by the President, and even without such disapproval, it was utterly inoperative, for this right of representation was a political right, which was lost by the very act of conquest, and could be restored to it only by the action of Congress, after its permanent incorporation into the conquering republic. The case, however, is different where the enemy possessed only a quasi-sovereignty, or limited political rights, over the conquered province or town. The conqueror acquires no other rights than such as belonged to the State against which he has taken up arms. 'War,' says Vattel, 'authorises him to possess himself of what belongs to his enemy. If he deprives that enemy of the sovereignty of a town or province, he acquires it, such as it is, with all its limitations and modifications. Accordingly, care is usually taken to stipulate, both in particular capitulations and in treaties of peace, that the towns and countries ceded shall *retain all their liberties, privileges, and immunities.*' But where such conquered provinces and towns have themselves taken up arms against him, thus making themselves directly his enemies, the conqueror may regard them as vanquished foes and treat them precisely as he would treat other conquered territory.[1]

Subjugation of an entire State

§ 3. If the hostile nation be subdued and the entire State conquered, a question arises as to the manner in which the conqueror may treat it without transgressing the just bounds established by the rights of conquest. If he simply replaces the former sovereign, and, on the submission of the people, governs them according to the laws of the State, they can have no cause of complaint. Again, if he incorporate them with his former States, giving to them the rights, privileges, and immunities of his own subjects, he does for them all that is due from a humane and equitable conqueror to his vanquished foes. But if the conquered are a fierce, savage, and restless people, he may, according to the degree of their indocility,

[1] Cross *v.* Harrison, 16 *How. R.*, 194; American Ins. Co. *v.* Canter, 1 *Peters R.*, 542; Marcy to Kearny, Jan. 11, 1847, *Ex. Doc.*, No. 17, 31st Cong., 1st sess. H. R.

govern them with a tighter rein, so as to curb their 'impetuosity, and to keep them under subjection.' Moreover, the rights of conquest may, in certain cases, justify him in imposing a tribute or other burthen, either a compensation for the expenses of the war, or as a punishment for the injustice he has suffered from them. But if he attempts to reduce the conquered people to a state of absolute subjection, or slavery, there is no complete conquest, for the state of warfare between the nation and himself is perpetuated. The Scythians said to Alexander the Great: 'There is never any friendship between the master and the slave. In the midst of peace the rights of war still subsist.'[1]

Retroactive effect of confirmation of conquest

§ 4. We have already remarked, that when one belligerent acquires military possession of territory belonging to an enemy, the sovereignty and dominion of the latter is suspended. If such possession be retained till the completion or confirmation of the conquest, the temporary dominion thus acquired by the conqueror becomes full and complete, *plenum dominium et utile.* Moreover, this confirmation or completion of the conquest has, so far as ownership is concerned, a retroactive effect, confirming the conqueror's title from the date of the conquest,[2] and, therefore, making definitely valid his

[1] Vattel, *Droit des Gens*, liv. iii. ch. xiii. § 201; Puffendorf, *De Jure Nat. et Gent.*, lib. viii. cap. vi. § 24; Réal, *Science du Gouvernement*, tome v. ch. ii. § 5; Abegg, *Untersuchungen*, &c., p. 86.

[2] Conquest gives a title, which the courts of the conqueror cannot deny, whatever may be the speculative opinions of individuals, respecting the original justice of the claim, which has been successfully asserted. But although this title is acquired and maintained by force, humanity, acting on public opinion, has prescribed rules and limits by which it may be governed. Thus, it is a rule that the captured shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other, the distinction between them is gradually lost, and they become one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired, that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of their being separated from their ancient connections, and united by force to strangers. When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes those restraints upon him, and he cannot neglect them without injury to his name and hazard of his power. (Johnson *v.* McIntosh, 8 *Wheat.*, 543.)

acts of ownership—alienation included—during his military occupation. But it can hardly be said, that the confirmation of the conqueror's title, by such retroactive effect, changes the previous legal condition of the conquered territory, and especially in its external relations. That is, the confirmation of the conquest does not make it a part of the conquering State during the time it was held simply under the rights of military occupation. Thus, the duties imposed on foreign goods, imported into such territory during military occupation, may have been very different from those which the conqueror could have imposed upon the same goods, when imported into his own State; if the confirmation of the conquest made such territory, in all respects, a part of the conquering State, from the date of its military occupation, it would be necessary to refund the difference between the collections made in it, as simply a foreign conquered territory, and those which could have been made in it, as a constituent part of the conquering State. This could hardly be claimed. The true theory is, that the retroaction of complete conquest only goes so far as to give permanency to the acts of the conqueror, done during military occupation.

Transfer of personal allegiance by conquest

§ 5. It is a general rule of international law that, on the transfer of territory by complete conquest or cession, the allegiance of the inhabitants of the conquered or ceded territory is transferred to the new sovereign.[1] Even the perpetual allegiance of the English Common Law yields to treaty, and it is held that when the king cedes by treaty, the inhabitants of the ceded territory become aliens. In the absence of express treaty stipulations, or legislation by the conqueror, the relations between the conquered and the conqueror are determined by the law of nations, which establishes the general rule, that the allegiance of the conquered is transferred to the new sovereign. It was held by the early civilians that such transfer of allegiance was absolute and unconditional, unless otherwise provided by some treaty stipulation; but the rule, as now understood and interpreted, is more liberal and just towards the inhabitants of the conquered territory. Burlamaqui very justly remarks that 'the end of a just war does not always demand that the conqueror should acquire an absolute and perpetual right of sovereignty

[1] *Vide ante*, ch. xii. §§ 30, 31.

over the conquered. It is only a favourable occasion of obtaining it, and for that purpose there must be an *express or tacit consent* of the vanquished. Otherwise, the state of war still subsisting, the sovereignty of the conquered has no other title than that of force, and lasts no longer than the vanquished are unable to throw off the yoke.' It has been shown in the preceding chapter, that on mere military conquest, the conquered may, but do not necessarily, cease to be regarded as aliens to the government of the conqueror; that mere military occupation does not, of itself, transfer the allegiance of the inhabitants of the territory so occupied absolutely and unconditionally to the conqueror. It only suspends their allegiance to their former sovereign, and imposes on them a *temporary* or *limited* allegiance to the government of military occupation. If the conquest is surrendered to the former owner, the temporary allegiance of the inhabitants ends with the temporary sovereignty of the conqueror, and the former owner, in recovering his sovereignty, recovers his claim to the allegiance of the inhabitants, and resumes the duty of protecting them. But, if the conquest is confirmed, the allegiance to the former sovereign is entirely severed, and that to the conqueror remains as it is, or becomes absolute, according to the relations which the inhabitants of the conquered territory hold towards the new sovereignty.[1]

The assent of the subject required

§ 6. The rule of public law, with respect to the allegiance of the inhabitants of a conquered territory, is, therefore, no longer to be interpreted as meaning that it is absolutely and unconditionally acquired by conquest, or transferred and handed over by treaty, as a thing assignable by contract, and without the assent of the subject. On the contrary, the express or implied consent of the subject is now regarded as essential to a complete new allegiance. The ligament which bound him to the former sovereign is dissolved by the trans-

[1] Vattel, *Droit des Gens*, liv. iii. ch. xiii. § 200; Grotius, *De Jure Bell. ac Pac.*, lib. iii. cap. viii.; Burlamaqui, *Droit de la Nat. et des Gens*, tome iv. pt. ii. ch. iii.; Puffendorf, *De Jure Nat. et Gent.*, lib. viii. cap. vi. § 24; Doe d. Thoman *v.* Acklam, 2 *B. C. R.*, 795; *Woodeson*, vol. i. lect. xiv. p. 382, cited, 2 *Cranch. R.*, 290; United States *v.* Perchman, 7 *Peters R.*, 86; Inglis *v.* the S. S. 'Harbour,' 3 *Peters R.*, 122; Lucas *v.* Strother, 12 *Peters R.*, 436; Campbell *v.* Hall, 1 *Cowp. R.*, 208; Talbot *v.* Jansen, 3 *Dallas R.*, 152; Lynch *v.* Clarke, 1 *Sandf. R.*, 644; M'Ilvaine *v.* Coxe's Lessee, 4 *Cranch. R.*, 211; Rayneval, *Inst. du Droit Nat.*, &c., liv. iii. ch. xx.; Westlake, *Private Int. Law*, § 27; Riquelme, *Derecho Púb. Int.* lib. i. tit. i. cap. i.

fer of the territory, for that sovereign can no longer afford him any protection in that territory. But he is still an alien to the new sovereign, and owes to him only that kind of allegiance called in law *local* or *temporary*, and which is due from any alien, while resident in a foreign country, for the protection which is afforded him by the government of such country. If the inhabitants of the ceded conquered territory choose to leave it on its transfer, and to adhere to their former sovereign, they have, in general, a right to do so. None but an absolute and tyrannical sovereign would force them to remain and become his unwilling subjects. By doing so he holds them in a kind of slavery, and, as justly remarked by Burlamaqui, continues the state of war between him and them. The rule of international law with respect to the transfer of the allegiance of the inhabitants of conquered territory, as established by the present usage of nations, is thus stated by Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States:—'On the transfer of territory, the relations of its inhabitants with the former sovereign are dissolved: the same act which transfers their country, *transfers the allegiance of those who remain in it.*' The allegiance of those *who do not remain*, of course, is *not* so transferred with the territory. In other words, they do not, by the transfer of the country, become the citizens or subjects of the conqueror, nor has he acquired any 'absolute and perpetual right of sovereignty' over them. There is no 'consent,' either 'express or tacit,' on their part, in order to make the transfer of allegiance complete and binding. But it is said that they deprive themselves of protection to their property, except so far as it may be secured by treaty.[1] The American States, during the War of Revolution, insisted upon the allegiance of all born within the States respectively, and Great Britain asserted an equally exclusive claim. When Great Britain acknowledged the independence of the States a question arose which gave birth to many legal opinions[2] —viz. whether the inhabitants who had remained loyal to the English Crown during the contest were, in consequence of the success of the rebellion, to lose their rights and privileges as British subjects. The treaty of Paris, in 1783, provided that

[1] United States *v.* Repentigny, 5 *Wall.*, 211.
[2] Forsyth, *Constit. Opinions*, 336.

there should be no confiscations or prosecutions against any persons for the part they had taken in the war, and that no persons should suffer on that account any future loss or damage; but it was silent on the subject of future allegiance, further than that his Britannic Majesty relinquished all claim to the government, propriety, and territorial rights of the United States. At the close of the Franco-German war, 1870, those natives of Alsace and Lorraine who retained their French nationality were forced to leave the ceded provinces, but nevertheless were permitted by the treaty of Frankfort to keep possession of their lands within the conquered territory.

Such assent determined by domicile

§ 7. From the above rule of international law, thus announced by Chief Justice Marshall, it appears that the transfer of territory establishes its inhabitants in such a position toward the new sovereignty, that they may elect to become, or not to become, its subjects. Their obligations to the former government are cancelled, and they may, or may not, become the subjects of the new government, according to their own choice. If they remain in the territory after this transfer, they are deemed to have elected to become its subjects, and thus have consented to the transfer of their allegiance to the new sovereignty. If they leave, *sine animo revertendi*, they are deemed to have elected to continue aliens to the new sovereignty. The *status* of the inhabitants of the conquered and transferred territory is thus determined by their own acts. This rule is the most just, reasonable, and convenient, which could be adopted. It is reasonable on the part of the conqueror, who is entitled to know who become his subjects, and who prefer to continue aliens; it is very convenient for those who wish to become the subjects of the new State; and is not unjust toward those who determine not to become its subjects. According to this rule, *domicile*, as understood and defined in public law, determines the question of transfer of allegiance, or rather, is the rule of evidence by which that question is to be decided.[1]

§ 8. This rule of evidence, with respect to the allegiance of

[1] Foelix, *Droit Int. Privé*, §§ 35, 36; Westlake, *Private Int. Law*, § 27; Doe *v.* Acklam, 2 *B. and C. R.*, 779; Doe *v.* Mulchester, 5 *B. and C. R.*, 771; Doe *v.* Arkwright, 5 *C. and P. R.*, 575; Jepson *v.* Riera, 3 *Knapp R.*, 130; *In re* Bruce, 2 *C. and J. R.*, 436; Com. *v.* Devreaux, 13 *Sim. R.*, 14; Thompson *v.* Adv.-Gen., 13 *Sim. R.*, 152; 12 *Cl. and F. R.*, 1.

Case of Hallemund

the inhabitants of ceded conquered territory, may be inconvenient to those who do not become subjects of the new sovereignty, as it requires them to change their domicile; but it is necessary for the protection of the rights of those who elect to become subjects of the new government, and especially necessary for determining the rights and duties of the government which acquires their allegiance, and is bound to afford them its protection. It would not do to leave the *status* of the inhabitants of the acquired territory uncertain and undetermined, and to suffer a man's citizenship to continue an open question, subject to be disputed by any person at any time, and to change with his own intentions and resolutions, as might best suit his convenience or interest. The reasonableness of the rule is manifest, and its necessity obvious; and the inconvenience to those who refuse allegiance to the new State is unavoidable in a public law. If we abandon the old principle of a forcible and absolute transfer of allegiance, and adopt that of an express or implied consent, it is necessary to adopt some rule of evidence by which that consent is to be determined; and we know of none better than that of *domicile*, as laid down by the Supreme Court of the United States, and approved by the best writers on public law.[1]

Count Platen Hallemund was prime minister of Hanover at the time of the capitulation of its army to Prussia in 1866. Hanover was afterwards forcibly annexed to Prussia, but before the annexation Count Platen left Hanover in the suite of the ex-King, who, by the terms of the capitulation, was allowed to choose his own residence, together with a suite of attendants. They took up their abode at Vienna; and, while there, Count Platen was summoned to appear before the Supreme Court of Judicature (Kammergericht) in Berlin, on a charge of high treason, alleged to have been committed by him abroad 'as a royal Prussian subject,' after he had ceased to reside in Hanover. According to the law of Prussia only a Prussian subject can be prosecuted before a Prussian court for an act of high treason committed abroad, and it was therefore necessary to assume that Count Platen

[1] Am. Ins. Co. *v.* Canter, 1 *Peters R.*, 542; M'Ilvaine *v.* Coxe's Lessee, 4 *Cranch. R.*, 211; Inglis *v.* the S. S. 'Harbour,' 3 *Peters R.*, 122; Riquelme, *Derecho Púb. Int.*, lib. i. tit. i. cap. 1; Westlake, *Private International Law*, § 27; Foelix, *Droit Int. Privé*, §§ 35, 36.

had become a Prussian subject in consequence of the annexation of Hanover by Prussia. He by his counsel pleaded to the jurisdiction of the court on the ground that he had never become a Prussian subject; and elaborate opinions were given by two German jurists (Professor Zachariæ of Göttingen and Professor Neumann of Vienna) to the effect that he had not. The court, however, overruled the plea, and proceeded against the Count *in contumaciam*, sentencing him to penal servitude for fifteen years. The propositions which Professors Zachariæ and Neumann maintained in their opinions with much learning were, that the mere fact of conquest or forcible annexation did not create the relation of sovereign and subject between the conqueror and the conquered, but that there must be either an express or tacit submission for the purpose, and in 'tacit submission' would be included the remaining within the sphere of the power of the new dominion and fulfilling the duties of subjects; but that it must be entirely left to the choice of the subjects of the subdued State whether they would acknowledge the new sovereign power or not. Consequently they are at liberty to emigrate, but if they remain 'they thereby tacitly declare that they enter the new State and population community; that is, the fact of their remaining is, according to the present law, considered as a silent declaration to that effect.'[1]

Its application to foreign residents

§ 9. This modern and more benign construction of the law of nations, with respect to the allegiance of the inhabitants of conquered or ceded territory, as announced by Chief Justice Marshall, avoids all questions of the *right* of the one State to transfer, and of the other to claim, the allegiance of subjects of neutral States who are naturalised or domiciled in the territory transferred by conquest or treaty. All are alike aliens to the new sovereignty, if they elect to continue so, and all become its subjects, if it consents to receive them and they, by remaining in the transferred territory, signify their election to become such. The new State has the same undoubted right to receive the voluntary allegiance of the subjects of a neutral power, who are naturalised or domiciled in the acquired territory, as of the subjects of that power when

[1] Forsyth, *Constit. Opinions*, 335; Heffter, *Das Europäische Völkerrecht*, §§ 178, 185; Schwarz, *De Jure Victoris in Res Incorporales* (1720); Vattel, liv. iii. c. 13, § 201.

they voluntarily enter the State and become its citizens by the ordinary modes of naturalisation. The former government, by the act of cession or confirmation of conquest, has relinquished all its claim to the allegiance of the inhabitants of the transferred territory, whether natives, naturalised citizens, or domiciled aliens. The old State, by the transfer of the territory, relinquishes its claim to the allegiance of its inhabitants, and the new State, by their tacit consent, receives them as its subjects. The neutral State can no more complain of the conqueror, for receiving as citizens its subjects who were naturalised by the conquered State, than it had to complain of the latter for naturalising them. Naturalisation by conquest and incorporation can no more be complained of than naturalisation by any other mode, so long as it is voluntary on the part of the person naturalised. And the transfer of allegiance, by the rule of domicile, or *animo manendi*, in the conquered territory, is certainly voluntary on the part of those who so remain.[1]

Rule may be varied by treaty or municipal law

§ 10. The inconveniences to those who do not transfer their allegiance, arising from making the law of domicile the rule of evidence by which to determine the consent of the conquered, may be avoided by treaty stipulations, or by the municipal laws of the conqueror. Provisions are sometimes made in treaties for special modes by which the inhabitants of ceded territory shall exercise their right of election otherwise than by domicile, such as judicial declarations and public registrations of intentions. Thus, in the eighth article of the treaty of Guadalupe-Hidalgo, between the United States and the Republic of Mexico, in 1848, it was provided that Mexican citizens established in the ceded territory might retain the character of Mexicans by declaring their intentions to that effect, within one year from the date of the exchange of ratifications; but without such declaration within such time, they were to be considered as having elected to become citizens of the United States. But no provisions of this kind were made in the treaties by which Louisiana and Florida were acquired; it, therefore, became necessary, in deciding questions of citizenship, in the absence of any special modes,

[1] Dubois case, 1 *Martin R.*, 285; United States *v.* Laverty et al., *Martin R.*, 747; Pothier, *Traité des Personnes*, tit. ii. § 1.

to resort to the general rule of international law, which makes domicile the evidence of assent or refusal, on the part of the inhabitants, to transfer their allegiance to the new sovereignty. In the treaties of 1814 and 1815, by which certain portions of territory acquired since 1791 by France were re-ceded to the allies, it was stipulated that the inhabitants of such territory who wished to remain in France might *become* Frenchmen by declaring their intention within a specified time. But this stipulation was objected to by French publicists as being harsh and illiberal, because it assumed that the national character of the inhabitants was forcibly changed by the transfer of the territory, leaving them no option to *retain* by domicile in French territory their character of Frenchmen.[1]

Right to citizenship under new sovereignty

§ 11. It may be laid down as a general rule, that the inhabitants of a conquered territory who remain in it, become citizens of the new State; for justice would seem to require that the rights of citizenship should be given them in return for their allegiance. But this general rule of justice must yield to the conditions upon which the conquered are incorporated into the new State, and to the peculiar character of the institutions and municipal laws of the conqueror. It could not reasonably be expected that the conquering State would modify or change its laws and political institutions by the mere act of incorporating into it the inhabitants of a conquered territory. The inhabitants so incorporated, therefore, may, or may not, acquire all the rights of citizens of the new government, according to its constitution and laws. It may, and sometimes does, happen, that a certain class of the citizens of the conquered territory are, by the laws of the new State, precluded from ever acquiring the full political rights of citizenship. This is the necessary and unavoidable result of the different systems of law which prevail in different States. Thus, certain persons who were citizens of Mexico, in California and new Mexico, on the transfer of those territories to the United States, by the treaty of Guadalupe-Hidalgo, never have and never can become citizens of the United States. Such citizenship is repugnant to the Federal Constitution and Federal organisation. Nevertheless, they may be citizens of California or New Mexico, according to

[1] *U. S. Statutes at Large*, vol. viii. pp. 202, 256.

the local constitutions and laws which those countries have already adopted, or which they may hereafter adopt.[1]

English law on this subject

§ 12. As has already been remarked, the laws of different countries with respect to the relations between the conqueror and the inhabitants of an acquired conquered territory, are very different. The rules of English law on this subject are, that 'a country conquered by the British arms becomes a dominion of the king in the right of his crown, ... that the conquered inhabitants once received under the king's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.' Although they owe the allegiance of subjects, and are entitled to the protection of subjects, it does not follow that they are entitled to all the political rights of an Englishman in England. They have the rights of British subjects *in the conquered territory*, but not necessarily the political rights of British subjects *in other parts of the empire*. It is said that 'an Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.' But an Englishman in Minorca has not the political rights of an Englishman in England. The inhabitants of a conquered territory are therefore British subjects, with the local rights of British subjects, but not with *all* the rights of Englishmen in the realm.[2]

American decisions

§ 13. The Supreme Court of the United States seems to have based its decisions upon the same general principles. The sixth article of the treaty by which Spain ceded the Floridas to the United States, is as follows: 'The inhabitants of the territories which his Catholic Majesty cedes to the United States, by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to all the privileges, rights, and immunities of citizens of the United States.' In delivering the opinion of the Supreme Court on this clause, Chief Justice Marshall remarks: 'This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. It is unnecessary to enquire, whether

[1] Dred Scott *v.* Sandford, 19 *Howard R.*, 393; Talbot *v.* Janson, 3 *Dallas R.*, 153.

[2] Wildman, *Int. Law*, vol. i. p. 162; the 'Flotina,' 1 *Dod. R.*, 450; Calvin's case, *Coke R.*, pt. vii.; Callet *v.* Lord Keith, 2 *East.*, 260; Blankard *v.* Guldy, 4 *Mod. R.*, 225.

that is not their condition, independent of treaty stipulation. They do not, however, participate in political power; they do not share in the government, till Florida shall become a State.' The word *citizen* is here used in its more extended sense, as understood in the law of nations, including men, women, and children, and not in the more restricted meaning attached to it in municipal law; that is, a person who, under the Constitution and laws of the United States, has a right to vote for representatives in Congress and other public officers, who is qualified to fill offices under the Federal Government, and who may sue and be sued as a citizen of the United States. There can be little or no doubt that the inhabitants of Florida, as intimated by Chief Justice Marshall, were entitled, without the treaty stipulation, to the 'privileges, rights, and immunities' of citizens, in this more extended sense of the term; but their right to be incorporated in the Union, and participate in political power, was derived from the treaty, and not a necessary consequence, under the law of nations, of the transfer of their country and of their allegiance. Their political power under the Federal Constitution and the laws of the United States, resulted from the admission of Florida into the Union as a State, and the political rights of citizenship of the United States thereby acquired were determined and limited, with respect to age, sex, colour, and condition, by our institutions and laws. It must also be remarked that a man may become a citizen of the United States without being a citizen of any particular State, or may become a citizen of a particular State without being a citizen of the United States.[1]

Laws of the conquered territory

§ 14. 'The laws of a conquered country,' says Lord Mansfield, 'continue in force until they are altered by the conqueror; the absurd exceptions as to pagans, mentioned in Calvin's case, shows the universality and antiquity of the maxim. For that distinction could not exist before the Christian era, and in all probability arose from the mad enthusiasm of the crusades.' This may be said of the municipal laws of the conquered country, but not of its political laws, or the relations of the inhabitants with the government. The rule is stated by Chief Justice Marshall, as follows: 'On the transfer of territory, it has never been held that the relations of the

[1] *U. S. Statutes at Large*, vol. viii. pp. 256, 257; Lynch *v.* Clarke, 1 *Sandf. R.*, 644.

inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory;—the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.' This is now a well-settled rule of the law of nations, and is universally admitted. Its provisions are clear and simple, and easily understood; but it is not so easy to distinguish between what are *political* and what are *municipal* laws, and to determine *when* and *how far* the constitution and laws of the conqueror change or replace those of the conquered. And in case the government of the new State is a constitutional government, of limited and divided powers, questions necessarily arise respecting the authority, which, in the absence of legislative action, can be exercised in the conquered territory after the cessation of war, and the conclusion of a treaty of peace. The determination of these questions depends upon the institutions and laws of the new sovereign, which, though conformable to the general rule of the law of nations, affect the construction and application of that rule to particular cases.[1]

Conquered territory under British laws

§ 15. It seems to be a well-settled principle of English law, that a country conquered by British arms becomes a dominion of the king, in right of his Crown, and therefore necessarily subject to the legislature, the Parliament of Great Britain; that the king, without the concurrence of Parliament, may change a part or the whole of the political form of the government of a conquered dominion, and alter the old, or introduce new laws into the conquered country; but that all this must be done subordinate to his own authority in Parliament, that is, subordinate to legislation; and that he cannot make any change contrary to fundamental principles; that he cannot, for instance, exempt the inhabitants of the conquered territory from the power of Parliament, or the laws of trade, or

[1] Rex *v.* Vaughan, 4 *Burr R.*, 2500; Calvin's case, *Coke R.*, pt. vii.; Am. Atty.-Gen. *v.* Stewart, 2 *Meriv. R.*, 154; Sprague *v.* Stone, *Doug. R.*, 38; Sheddon *v.* Goodrich, 8 *Vesey R.*, 482; Mostyn *v.* Fabrigas, 1 *Cowp. R.*, 165; Smith *v.* Brown, 2 *Salk. R.*, 666; Evelyn *v.* Forster, 8 *Vesey R.*, 481; Clark, *Colonial Law*, p. 4; Bowyer, *Universal Public Law*, ch. xvi. p. 158; Burge, *Commentaries*, vol. i. pp. 31, 32; Morley, *Digest of Indian Cases*, pp. 169, 170.

give them privileges exclusive of his other subjects. Thus, Ireland received the laws of England by the charters and commands of Henry II., John, Henry III., Edward I., and the subsequent kings, without the interposition of the Parliament of England. The same is said of Wales, Berwick, Gascony, Guienne, Calais, Gibraltar, Minorca, &c. So of New York; after its conquest from the Dutch, Charles II. changed its constitution and political government by *letters patent* to the Duke of York. If the king comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of Parliament. The constitutions of most English provinces, immediately under the king, have arisen not from grants, but from commissions to governors to call assemblies. In 1722, Sir Philip Yorke and Sir Clement Wearge reported, on the assembly of Jamaica's withholding the usual supplies, that 'if Jamaica was still to be considered a *conquered island*, the *king* had a right to levy taxes upon the inhabitants; but if it was to be considered in the same light as the other *colonies*, no tax could be imposed on the inhabitants but by an *assembly of the island* or by *an Act of Parliament*.' They considered, says Lord Mansfield, the distinction in law as clear, and an indisputable consequence of the island being in the one state or in the other. Whether it remained a conquest, or was made a colony, they did not examine. A maxim of constitutional law, as declared by all the judges in Calvin's case, and which such men, in modern times, as Sir Philip Yorke and Sir Clement Wearge took for granted, will require some authorities to shake. But, on the other side, no book, no saying, no opinion has been cited, and no instance in any period of history produced, where a doubt has been raised concerning it.[1]

Under the United States

§ 16. The right of the king to change the laws of a conquered territory, after the war, results, according to the decisions of English courts, from his constitutional power to make a treaty of peace, and consequently to yield up the conquest, or to retain it upon whatever terms he pleases, provided those terms are not in violation of fundamental principles. But the President of the United States can make no treaty with-

[1] Campbell *v.* Hall, 1 *Cowp. R.*, 205; Fabrigas *v.* Mostyn, 1 *Cowp. R.*, 165; Callett *v.* Lord Keith, 2 *East. R.*, 260.

out the concurrence of two-thirds of the Senate, and his authority over ceded conquered territory, though derived from the law of nations, is limited by the Constitution and subordinate to the laws of Congress. It, however, is well settled by the Supreme Court, that, as constitutional commander-in-chief, he is authorised to form a civil or military government for the conquered territory during the war, and that when such territory is ceded to the United States, as a conquest, the existing government, so established, does not cease as a matter of course or as a consequence of the restoration of peace; that, on the contrary, such government is rightfully continued after the peace, and till Congress legislates otherwise; but that the President may virtually dissolve this government by withdrawing the officers who administer it; *provided*, he does not thereby neglect his constitutional obligation 'to take care that the laws be faithfully executed.' He is bound, for example, to prevent the landing of foreign goods in the United States out of any collection district and without the payment of duties, and to do this he must employ the constitutional means at his disposal. He may do this through the government which he has established during the war, by the right of conquest, and which existed when that conquest was ratified by peace, or, if he dissolve that government, the constitutional obligation remains to be performed by other means. So long as that government continues, with the express or implied sanction of the President, it represents the sovereignty of the United States, and has the legal authority to enforce and execute the laws which extend over such territory. Congress may, at any time, put an end to this government of the conquered territory, and organise a new one; or it may permit the people of such territory to form a constitution, and admit it as a new State into the Union. The power of Congress over such territory is clearly exclusive and universal, and their legislation is subject to no other control or limit than the stipulations of cession and the Constitution. But, connected with these general rights and powers of Congress, there are also obligations and duties. These are to be ascertained from the law of nations, the stipulations of cession, and the principles of the Federal Constitution. But, so long as neither Congress nor the President direct otherwise, the government established during the war, and existing on

the restoration of peace, continues with the implied consent of both. 'The right inference,' says Mr. Justice Wayne, in delivering the unanimous opinion of the Supreme Court, 'from the inaction of both, is, that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the cause of delay, it must be presumed that the delay was consistent with the true policy of the government.' California and New Mexico were acquired by conquest, confirmed by cession. During the war they were governed as conquered territory under the law of nations, and in virtue of the belligerent rights of the United States as the conqueror, by the direction and authority of the President, as commander-in-chief. By the ratification of the treaty of Guadalupe-Hidalgo, on May 20, 1848, they became a part of the United States, as ceded conquered territory. The civil governments, established in each during the war, and existing at the date of the treaty of peace, continued in operation after that treaty had been ratified. California, with the assent and co-operation of the existing government, formed a constitution, which was ratified by its inhabitants, and a State government was put in full operation in December 1849, with the implied assent of the President, the officers of the existing government of California publicly and formally surrendering all their powers into the hands of the newly-constituted authorities. The constitution so formed and ratified was approved by Congress, and California was, on September 9, 1850, admitted into the Union as a State. New Mexico also formed a constitution, and applied to Congress for admission as a State; the application was not granted; but on September 9, 1850, New Mexico and the part of California not included within the limits of the new State were organised into Territories, with new Territorial governments, which took the place of those organised during the war, and existing on the restoration of peace.[1]

§ 17. It seems to be a well-established rule of the law of nations, that, on the cession of a conquered territory by a

[1] Campbell *v.* Hall, 1 *Cowp. R.*, 204; *U. S. Statutes at Large*, vol. ix. pp. 446, 452, 453; Cross et al. *v.* Harrison, 16 *Howard R.*, 164; Dunlop, *Digest of Laws of U. S.*, pp. 1238-1250; Brightly, *Digest of Laws, of U. S.*, pp. 105, 693, 890; Dred Scott *v.* Sandford, 19 *How. R.*, 393.

Laws of conquered territory and the constitution of the new State

treaty of peace, the inhabitants of such territory are remitted to the municipal laws and usages which prevailed among them before the conquest, so far as not changed by the constitution or political institutions of the new sovereignty, and the laws of that sovereignty which *proprio vigore* extend over them. This leads us to enquire, *first*, whether the municipal laws in force prior to the conquest, and suspended or changed during the war, are revived *ipso facto* by the treaty of peace; and, *second*, what laws of the new sovereignty are considered as extending over the acquired territory immediately on its cession, and without any special provisions to that effect, either in the laws themselves, or as enacted by the legislative power. It has already been shown that, according to the decision of the English courts, the laws of the conquered territory must be subordinate to the British Constitution, as the king himself cannot there establish laws, or confer privileges contrary to fundamental principles. And there can be little doubt that the Federal Constitution is extended over conquered territory which, by confirmation or cession, becomes a part of the United States. It is true that the territory acquired as a *conquest* is to be preserved and governed as *such*, until the sovereignty to which it has passed legislate for it, or gives it the authority to legislate for itself. In conquests made by England, this may be done by the commands or letters patent of the king, and in those made by the United States by the law of Congress. In the former case, the local government, acting under royal authority, represents the crown, and must act in subordination to Parliament, and the fundamental principles of the British Constitution. In the latter case, the local government, acting under the direction of the President, represents the sovereignty of the United States, to which the territory has passed. And, as that sovereignty is the United States, under the Federal Constitution, no powers can be exercised in that territory, either by the President, or by Congress, which are opposed to the Federal Constitution; and it necessarily follows that the inhabitants of such territory acquire, immediately on its becoming a part of the United States, the privileges, rights, and immunities guaranteed by the constitution. They do not, indeed, thereby acquire the political rights of *citizens*, entitling

them to vote for representatives in Congress, or to sue and be sued in the Federal courts; but they thereby become privileged as subjects of the United States, and no powers opposed to the Federal Constitution can be exercised over them; they owe an allegiance to the government of the United States, and are entitled to its protection.

How far laws of military occupation continue after complete conquest

§ 18. We have already remarked, that the relations of the inhabitants of the conquered territory, *inter se*, are not, in general, changed by the act of conquest and military occupation; nevertheless, that the conqueror, exercising the powers of a *de facto* government, may suspend or alter the municipal laws of the conquered territory, and make new ones in their stead. Such changes are of two kinds, viz. those which relate to a suspension of civil rights and civil remedies, and the substitution of military laws, and military courts and proceedings; and those which relate to the introduction of new municipal laws, and new legal remedies and civil proceedings. There can be no doubt that when the war ceases the inhabitants of the ceded conquered territory cease to be governed by the code of war. Although the government of military occupation may continue, the rules of its authority are essentially changed. It no longer administers the laws of war, but only those of peace. The governed are no longer subject to the severity of the code military, but are remitted to their rights, privileges, and immunities, under the code civil. Hence, any laws, rules, or regulations introduced by the government of military occupation during the war, which infringe upon the civil rights of the inhabitants, necessarily cease with the war in which they had their origin, and from which they derived their force. But if this government, during military occupation, has granted to the inhabitants rights which they did not possess under their former laws, or if it has abolished former municipal laws deemed odious and oppressive—as, for example, laws conferring privileges of rank, or distinguishing between the civil rights of classes and castes—these will not be revived as a necessary consequence of peace. They may, however, be revived as a consequence of the institutions and laws of the new sovereignty; and even rights and immunities, not suspended or infringed during the war, may entirely cease on the treaty of peace, as a consequence of the cession,

and the introduction of the civil government and civil jurisprudence of the new sovereign.[1]

To the laws of the new sovereignty

§ 19. We will next consider what laws of the new sovereign extend over the ceded conquered territory without legislative action, or any special provisions to that effect in the laws themselves. When a country which has been conquered is ceded to the conqueror by the treaty of peace, the *plenum et utile dominium* of the conqueror will be considered as having existed from the beginning of the conquest. When it is said that the law political ceases on the conquest, and that the law municipal continues till changed by the will of the conqueror, it is not meant that these latter laws, *proprio vigore*, remain in force, but that, it is presumed, the new political sovereign has adopted and continued them as a matter of convenience. They do not derive any force from the will of the conquered, for the person capable of having and expressing a will—the body politic, or law-making power of the conquered—is extinguished by the conquest. When, therefore, we come to pronounce upon the force of a law of the conquered people after the conquest, and to determine whether it has been tacitly adopted by the conqueror, we must look to the character of its provisions, and compare them with the laws and institutions of the conquering State: that is, with the will of the conqueror as *expressed* by himself in similar matters. Whatever is in conflict with, or directly opposed to, such expressions of his will, we cannot presume to have been adopted by his tacit consent. Hence, Lord Coke says, if a Christian king should conquer an infidel country, the laws of the conquered, *ipso facto*, cease, because it is not to be presumed that a Christian king has adopted the laws of an infidel race. But, where there is no such conflict in the institutions and laws of the two countries, those of the conquered which regulate personal relations, commercial transactions, and property in all its modes of transfer and acquisition, are presumed to have been adopted as a matter of convenience. This rule of international law is both reasonable and just. Each case must rest upon its own basis, and be judged of by its own circumstances. From this view of the jurisprudence of the conquered country, we must determine what laws of the acquired territory remain in force,

[1] Gardiner *v.* Fell, 1 *Jack. and Walk. R.*, 27; Heffter, *Droit International*, § 185.

and what laws of the conqueror, *proprio vigore*, extend over such territory.[1]

Distinction in English law between conquered and discovered territory

§ 20. The English courts make a distinction between ceded or conquered territory, and territory acquired by discovery, or occupancy, and peopled by the discoverer. British colonists are considered as carrying with them such laws of their sovereign as are beneficial to the colony and applicable to the new condition of the colonists; but penal laws, inflicting forfeitures and disabilities, laws of tithes, bankruptcy, mortmain, and police do not extend to colonies not *in esse*. And laws passed after the settlement of a discovered or occupied country do not affect such colony, without special provisions to that effect, unless they relate to the exercise of the powers of the sovereign with regard to foreign relations, navigation, trade, revenue, and shipping. But the rule is different with respect to territory acquired by cession or conquest, for the municipal laws of such territory at the time of its acquisition remain till changed by competent authority, and the subjects of the new sovereignty who enter such newly-acquired territory do not, in general, carry with them the laws of their sovereign; but with respect to their rights and relations *inter se*, they are in the same condition as the inhabitants of such territory; that is, they are governed by the laws and usages of the country at the time of the conquest or cession. 'Whoever purchases, lives, or sues there puts himself under the laws of the place; an Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privileges distinct from the natives.'[2]

Laws contrary to fundamental principles of new sovereignty

§ 21. There can be no doubt of this *general* principle of English Common Law: that the inhabitants of territory acquired by cession or conquest are governed in their relations *inter se* by the municipal laws of such territory in force at the time of the cession or conquest, and that statutes previously passed do not, in general, extend *proprio vigore* over such territory. Nevertheless, it is equally true that *some* of the laws of the new sovereignty do extend over such newly-acquired territory, and that the existing municipal laws of such terri-

[1] Calvin's case, *Coke R.*, pt. 7.

[2] *Dwarris on Statutes*, pp. 527, 905, 906; Atty.-Gen. *v.* Stewart, 2 *Meriv. R.*, 143; Darnes *v.* Painter, *Freem. R.*, 175; Blackstone, *Com.*, vol. i. p. 102; Clarke, *Colonial Law*, p. 4.

tory are, in some degree, modified and changed by the acts of acquisition, and without any special decree, or statute, of the executive or legislative departments of the new sovereignty. Thus, any municipal laws existing in such territory, which are in violation of treaty stipulations with foreign nations, or of the general laws of trade, navigation and shipping, or which give privileges exclusive of other subjects, are not only void in themselves, but the king even cannot introduce any which are contrary to fundamental principles. However absurd the exception as to pagans, mentioned in Calvin's case, there can be no doubt of the correctness of the general rule, that the laws of the conquered territory which are contrary to the fundamental principles of the government of the conqueror, cease, on the complete acquisition of the conquered territory, because they are opposed to the *already expressed will* of the conqueror. All other municipal laws continue in force till changed by the same will subsequently expressed; that is, the king *himself* may change these laws, or he may, by his *charters* and *commands*, authorise the conquered country to do so. Such authority is derived directly from the crown, and without the interposition of Parliament.[1]

Decisions of the Supreme Court of the United States

§ 22. The Supreme Court of the United States, where questions of this kind have come before that tribunal, have adopted the decisions of the English courts, so far as applicable to its system of government. While recognising the general principle that the laws of the conquered territory remain in force after the cession, they distinctly assert that the ceded territory becomes instantly bound and privileged by the laws which Congress has previously passed to raise revenue from duties on imports and tonnage; and that such territory is subject to the Acts of Congress, previously made to regulate foreign commerce with the United States, without other special legislation declaring them to be so. And although Congress may not have established collection districts or custom houses, or authorised the appointment of officers to collect the revenue accruing upon the importation of foreign dutiable goods into that territory, nevertheless, it may be legally demanded and lawfully received by the officers of the government, which was organised in such territory by the right of conquest, and existing at the date of the cession. California became a part of

[1] Bowyer, *Universal Public Law*, ch. xvi.

the United States as a ceded conquered territory, by the treaty which was ratified on May 30, 1848; but the Act of Congress, including San Francisco within one of the collection districts of the United States, was not passed till March 3, 1849, and the collector authorised by law to be appointed for that port did not enter upon the duties of his office till November 13, 1849. The ratification of the treaty was not officially announced in California till August 17, 1848. The civil government of California, which had been organised during the war, by right of conquest and military occupation, continued to collect duties under the war tariff till officially notified of the ratification of the treaty of peace; it then declared that 'the tariff of duties for the collection of military contributions will immediately cease, and the revenue laws and tariff of the United States will be substituted in its place,' and continued to enforce these laws and to collect the revenue accruing under them upon the importation of foreign dutiable goods into California, until November 13, 1849, when the collector, duly appointed under the authority of an Act of Congress, entered upon his duties. The importers of such dutiable goods denied the legality of these collections, and protested against the exaction of duties, and subsequently brought suit against the officers of the civil government to recover the moneys so collected, with interest. The legality of the acts of these officers was sustained by the unanimous opinion of the Supreme Court of the United States; and Mr. Justice Wayne, in delivering the opinion of the court, said that the officers, in coercing the payment of dutiable goods landed in California, 'had acted with most commendable integrity and intelligence.' [1]

Revenue laws in California

§ 23. There is one point in this decision deserving of particular notice, with respect to the operation of laws which extend, *proprio vigore*, over ceded conquered territory. A statute law of the United States, when no time is fixed in the law itself, takes effect in every part of the Union from the very day it is passed. Not so, however, with the operation of existing revenue laws over newly acquired territory, which, though a part of the United States, is not within the Union.

[1] Cross et al. *v.* Harrison, 16 *How. R.*, 201; Dunlop, *Digest of Laws of U. S.*, pp. 1214, 1215; Brightly, *Digest of Laws of U. S.*, p. 115; *U. S. Statutes at Large*, vol. ix. p. 400.

As already remarked, nearly three months elapsed between the ratification of the treaty of cession and its official announcement in California. During that interval, tonnage and impost duties were imposed and collected according to the *war tariff*, instead of the tariff of the United States. If the revenue laws extended over California, *eo instante*, on the ratification of the treaty by which that territory was acquired, these duties were unlawfully collected. It was so claimed by those who had paid them, and suit was brought for their recovery. But Mr. Justice Wayne, in delivering the opinion of the Supreme Court on this question, remarked: 'It will certainly not be denied that these instructions [imposing the war tariff] were binding upon those who administered the civil government in California, *until* they had notice from their own government that a peace had been finally concluded. Or that those who were locally within its jurisdiction, or who had property there, were not bound to comply with those regulations of the government, which its functionaries were ordered to execute. Or that any one would claim a right to introduce into the territory of that government foreign merchandise, without the payment of duties which had been originally imposed under belligerent rights, *because the territory had been ceded by the original possessor and enemy to the conqueror.* Or that the mere fact of a territory having been ceded by one sovereignty to another, opens it to a free commercial intercourse with all the world, as a matter of course, until the new possessor has legislated some terms upon which that may be done. There is no such commercial liberty known among nations, and the attempt to introduce it in this instance is resisted by all of those considerations which have made foreign commerce between nations conventional. The treaty that gives the right of commerce is the measure and rule of that right.[1] The plaintiffs in this case claim no privilege for the introduction of their goods into San Francisco, between the ratifications of the treaty with Mexico and the official announcement of it to the civil government in California, other than such as that government permitted under the instructions of the government of the United States.'[2]

[1] Vattel, liv. i. ch. viii. § 93.

[2] Matthews *v.* Zane, 7 *Wheat. R.*, 104; the 'Ann,' 1 *Gallis R.*, 62; Cross et al. *v.* Harrison, 16 *Howard R.*, 191.

Conquest changes political rights, but not rights of property

§ 24. It has already been remarked that, in the transfer of territory by conquest or cession, the *political* rights of its inhabitants may be essentially changed. This results from a difference in the powers and character of governments, as depending upon their constitutions or fundamental laws. The new government may not be capable of receiving or exercising all the powers of the old one, or it may not extend to the governed all the political rights which they enjoyed under the former sovereign. But a change of sovereignty is not, in modern times, permitted to effect any change in the rights of private property. What was the property of the former sovereign becomes the property of the new one, and what was the property of individuals before, remains private property, notwithstanding the conquest or cession. 'The modern usage of nations,' says Chief Justice Marshall, speaking of the transfer of a country from one government to another, 'which has become a law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed.' The rule of international law, thus clearly enunciated by the Supreme Court of the United States in 1833, has since been repeatedly recognised in the decisions of the same tribunal.[1]

Title to private property

§ 25. As the new State merely displaces the former sovereignty, and acquires, by cession or complete conquest, no claim or title whatever to private property, whether of individuals, municipalities, or corporations, and as it assumes the duties and obligations of the former sovereign with respect to private property within such acquired territory, it is conse-

[1] United States *v.* Perchman, 7 *Peters R.*, 87; Mitchel *v.* the United States, 9 *Peters R.*, 734; Strother *v.* Lucas, 12 *Peters R.*, 38; New Orleans *v.* the United States, 10 *Peters R.*, 720; Riquelme, *Derecho Púb. Int.*, lib. i. tit. ii. cap. 12.

Territory conquered during the progress of a war, is considered, for all commercial and belligerent purposes, as a part of the domain of the conqueror, so long as he continues in its possession and government. Whatever, then, may be the general commercial or political character of a proprietor of land, in such territory, the possession of the soil impresses upon him its own character, so far as its produce is concerned, in the transportation to another country. (Thirty Hogsheads of Sugar *v.* Boyle, 9 *Cranch.*, 191.)

quently bound to recognise and protect all private rights in lands, whether they are held under absolute grants or inchoate titles, for *property* in land includes every class of claim to real estate, from a mere inceptive grant to a complete, absolute, and perfect title. A mere equity is protected by the law of nations as much as a strictly legal title. In the words of Chief Justice Marshall, 'the term "property," as applied to lands, comprehends every species of title, incohate or complete. It is supposed to embrace those rights which lie in contract; those which are executory; as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away.'[1]

Necessity of remedial laws

§ 26. We are of opinion that the above rule of international law laid down by Chief Justice Marshall, and repeated in numerous decisions of the Supreme Court of the United States, is correct. It not unfrequently happens, however, that much injustice and inconvenience will result to the owners of property in a ceded or conquered territory, by the transfer of themselves and their property from one system of laws to another very different from the first, and wholly inadequate to afford remedies for a violation of the rights of property. And as the law of nations and the usage of the civilised world impose upon the new sovereignty the duty to maintain and protect the property of the conquered inhabitants, it is bound to take the necessary steps to clothe equities with a legal title, so as to bring them within the scope of legal remedies under its own laws. It is with this view that Congress has usually passed remedial Acts for the ascertainment and recognition of lands of private ownership in territories acquired by the United States. Although the

[1] Soulard et al. *v.* the United States, 4 *Peters R.*, 512; Mitchel et al. *v.* the United States, 9 *Peters R.*, 733; United States *v.* Perchman, 7 *Peters R.*, 51; Chouteau's heirs *v.* the United States, 9 *Peters R.*, 137.

It was decided by the Supreme Court of the United States that, in cases of conquest, the conqueror does no more than replace the sovereign and assume dominion over the country. A cession of territory is never understood to be a cession of the property of the inhabitants. The king cedes only that which belongs to him; lands he had previously granted were not his to cede. The cession of a territory should necessarily be understood to pass the sovereignty only, and not to interfere with private property. No construction of a treaty which would impair that security to private property, and which the laws and usages of nations would, without express stipulation, have conferred, would seem to be admissible, further than its positive words require. (Strother *v.* Lucas, 12 *Pet.*, 410.)

maintenance of such property may be fully guaranteed by the law of nations and the stipulation of treaties, yet, in order to place it under the careful guardianship of our municipal laws, it is necessary to invest it with a new attribute of a *legal* title, without which the owner may be unable either to maintain his own possession or eject an intruder. For example, a right or title to lands which, under Spanish or Mexican law, is abundantly sufficient for the security and protection of the owner in his rights, may be utterly useless for such purposes under our laws, as it neither secures him in the possession and enjoyment of his property, nor enables him to bring a suit to eject an aggressor. A refusal or neglect to pass the necessary remedial acts in such cases, so as to invest equities with such legal attributes as will place all private property, of whatsoever description, under the guardianship of our laws, would be a violation of the obligations imposed upon us by the law of nations and the usage of the civilised world. A delay in applying such remedies is often equivalent to a denial of justice, or a confiscation of private property, and is, therefore, a breach of public law and a violation of national faith.[1]

Effect of conquest on the property of the State

§ 27. It follows, from the principles laid down in this and the preceding chapters, that complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government; or, in other words, the conqueror, by the completion of his conquest, becomes, as it were, the heir and universal successor of the defunct or extinguished State. As his rights are no longer limited to mere occupation, or to what he has taken physically into his possession, they extend not only to the corporeal property of the State, as real estate and movables, but also to its incorporeal property, as debts, &c. And as his *imperium* has become established over the whole State, he is considered, in law, as in possession of the *things* (corpora), and the *rights* (jura) to things which appertain to such *imperium*, and may use and dispose of them as his own. It was on this ground that the validity of Alexander's gift to the Thessalonians was principally sustained, and those who advocated the claim of Thebes, did so, mainly, on the supposition that the conquest was not complete, and that the absolute and entire dominion over the universal successorship

[1] *U. S. Statutes at Large*, vol. x. p. 63; United States *v.* Reading, 8 *How. R.*, 8

to Thebes had not accrued to Alexander.[1] Jurists have much more difficulty in agreeing upon the question of the completion of the conquest, prior to the restoration of the former sovereign, than upon the legal consequences to be deduced from the conquest when complete; and it is only in case of a restoration that any question arises with respect to the right of the conqueror to dispose of either the domains or debts of the conquered State.

The alienated domains of Hesse-Cassel

§ 28. When the allied powers of Europe overthrew the dynasty of Napoleon, and restored to the countries which he had subdued their legitimate sovereigns, no general provision was made in the peace of Paris for the protection of rights acquired under the *de facto* rulers (the amnesty provided for in the 27th article being limited in its extent); nevertheless reason, good sense, and the law of nations were generally allowed to prevail, and rights and titles so acquired were left undisturbed. The only exceptions were confined to one or two small German States, and these were considered as most

[1] See *ante*, ch. xxxiii. § 29; Phillimore, *On Int. Law*, vol. iii. §§ 561, 562; Heffter, *Droit International*, §§ 185, 186; Schwartz, *De Jure Victoris*, &c., thes. 27.

It was held, by the Rolls Court of Great Britain, that if a foreign power takes prisoner an enemy, and thereby obtains possession of documents, establishing his right to a debt due from another, to him, in his private capacity, the prisoner is entitled to relief in equity; the circumstance that the foreign power is also the debtor will not alter the right; but if such documents are the property of the prisoner, in his sovereign character, and are taken possession of by the conqueror in the exercise of his sovereign and political rights, that Court could not interfere. (Wadeer *v.* the East India Company, 7 *Jur.* (N.S.), 350. See also the Secretary of State for India *v.* Kamachee Boye Sahaba, 7 *Moo. Ind. App. Cas.*, 476.) An ordinance was made by the Government of Denmark in 1817, pending hostilities with Great Britain, whereby all ships, goods, money, and money's worth, of or belonging to the English subjects, were declared to be sequestrated and detained, and all persons were commanded, within three days, to transmit an account of debts, due to English subjects, in default of which they were to be proceeded against in the Exchequer; in consequence of this a suit then depending in the Danish Court, for recovering a debt due from a Danish to a British subject, was not further prosecuted, and the debt was afterwards paid by the Danish subject, at the rate specified by the ordinance, to commissioners appointed in virtue of the ordinance to receive payment, upon production of whose receipt the Danish Court quashed the suit. This was held, in the British Court of King's Bench, to be no answer to an action against the Danish subject, to recover the same debt in the courts of Great Britain, for the ordinance not being conformable to the usage of nations was held to be void. (G. Wolff and others *v.* Oxholm, 6 *Mau. and Selw.*, 92. The question of Alexander and the 100 talents of the Thebans is discussed in this case. See also *Recueil d'Arrêts Notables des Cours Souveraines de France*, by Johan Pepon, Paris, 1601, 4to.)

discreditable to the petty sovereigns who made them. The most noted of these was the Prince of Hesse-Cassel, who was driven from the Electorate in 1806, and not restored till about the beginning of 1814. His country had remained about a year under the military government of Napoleon, and was then incorporated into the newly-formed kingdom of Westphalia, of which Jerome Bonaparte was recognised as king, by the peaces of Tilsit and Schönbrunn. On his return to his hereditary dominions, in 1814, the Prince refused to recognise the validity of the alienations of the domains of his country, which had taken place under the *de facto* governments, since his expulsion, in October 1806; the purchasers of these lands were deprived of their possessions which they had purchased and paid for in good faith, and which had been delivered to them with every formality of law. The supreme court of appeal, in Cassel, was stopped by an *inhibitorium* from taking cognisance of the matter, and the unfortunate proprietors were, in some instances, driven from their possessions by a troop of the Elector's hussars. They appealed in vain for protection to the Congress of Vienna; Prussia, through the mouth of her chancellor, Prince von Hardenberg, declared in their favour; but the other nations represented in that Congress gave no heed to the complaints made against a prince whom they had just restored to power. Resort was then had to the German Confederation, but this modern Amphictyonic assembly either could not, or would not, interfere between a sovereign prince and his own subjects. Public jurists, however, have not failed to condemn the conduct of the Elector, as contrary to law and justice. His pretext for denying the validity of these alienations was mainly founded upon the '*lex de captivis et postliminio*' of the Roman law; but it was readily shown that this law could not be applied directly, and that the argument deduced from its *analogy* was adverse to his position. He virtually acknowledged the weakness of his case, by refusing to arbitrate the question, or even to permit his own courts to take cognisance of it.[1]

[1] Pfeiffer, *Das Recht der Kriegseroberung*, p. 237; Schweikart, *Napoleon und die Curh.*, pp. 60 et seq.; Rotteck und Welcker, *Staats-Lexicon*, verb. 'Domainenkäufer;' *Conversations-Lexicon*, verb. 'Domainenverkauf;' Koch, *Hist. de Traités de Paix*, tome iii. p. 364; *Encyclopædia Americana*, verb. 'Domain,' Digest xlix. t. xv. 12, 3; Phillimore, *On Int. Law*, vol. iii. §§ 573, 574.

The debts of Hesse-Cassel

§ 29. The Prince of Hesse-Cassel also denied the validity of the payment or cancellation of the debts which were owing to his government in 1806, and which had been paid or alienated prior to his restoration. Being absolute lord over his subjects, who were exceedingly poor, he had enriched himself by selling their valour and lives, to fight the battles of other sovereigns, and the gold thus acquired had been invested in his own name, as sovereign, in loans and mortgages, to the inhabitants of other States. On the conquest of Hesse-Cassel, by Napoleon, these debts were confiscated, and made payable only to the treasury of what was called the '*domaine extraordinaire*.' And when the greater part of this Electorate was incorporated into the kingdom of Westphalia, a compact was entered into at Berlin, between King Jerome and Napoleon, for the division and adjustment of the debts owing to the extinguished Electorate. The Bonapartes had no difficulty in collecting those due from the subjects of their newly-acquired dominions, for there force could be resorted to, in order to compel payment; but where the debtors resided in other States the payment was in a measure voluntary, and even where the debtors were willing to pay a difficulty occurred in releasing the mortgages, as the record could be cancelled only by the authority of the creditor therein named. To remove this difficulty in the Duchy of Mecklenburg, the Duke issued an order, *circular rescript*, on June 15, 1810, which, after reciting the complete conquest of Hesse-Cassel by Napoleon, and the extinguishment of the former sovereignty, directed the court of registration to record, as extinguished, those mortgages in favour of Hesse-Cassel on estates in that duchy, for which a discharge or receipt had been given by Napoleon, or by his appointee for that purpose. Among the estates so mortgaged and released were those of a certain Count van Hahn, whose case acquired much celebrity and will serve to illustrate the fact and the law. After the death of the Count and the restoration of the Prince of Hesse-Cassel, the latter instituted proceedings as a creditor against his estate, denying the validity of the payment and the legality of the discharge of the mortgage. The first tribunals (the University of Breslau in 1824, and that of Kiel in 1831) decided, in substance, that the Prince might recover that portion of the debt which had not been *actually*

paid to Napoleon, and no more. Both parties being dissatisfied with this judgment, an appeal was taken to another university (tribunal), which learned body delivered at great length the reasons of their final decision, which was, in substance, that all the debts to Hesse-Cassel, for which discharges had been given in full by Napoleon, *whether the whole sum had been actually paid or not*, were validly and effectually cancelled, and that the debtors could not be called upon to pay a second time. These learned jurists drew a broad distinction between the acts of a transient conqueror on mere military occupation, and those of one whose rights and titles had been ratified by the public acts of the State, and recognised in treaties with foreign powers. The judgments of the tribunals of Breslau and Kiel were based on the supposition that the conquest was only a *temporary* one ; but the learned judges said it was impossible to consider the return of the Prince of Hesse-Cassel as a continuation of his former government. They rejected the consideration of the justice or injustice of the war, in which the Electorate had been conquered, nor did they attach any importance to the fact, that the Prince had carried away with him, and retained possession of, the instruments containing the written acknowledgment of the debtor. It will be noticed that this decision virtually confirms the validity of the alienation of domains made by the *de facto* government of the conquests of Napoleon.[1]

[1] Heffter, *Droit International*, §§ 186, 188 ; Zachariæ, *Ueber die Verpflichtung*, &c., b. iv. p. 104.

CHAPTER XXXV

RIGHTS OF POSTLIMINY AND RECAPTURE

1. Right of postliminy defined—2. Its foundation—3. Time of its taking effect—4. Effect of a treaty of peace—5. Of allies who are associates in the war—6. Its effect upon things and persons in neutral territory—7. Upon movables on land—8. Real property—9. Towns and provinces—10. Release of a subjugated State—11. Case of Genoa in 1814—12. Application of postliminy to maritime captures—13. Text-writers and prize courts—14. Rights of postliminy modified by treaties and municipal laws—15. Laws of Great Britain—16. Laws of the United States—17. Laws of different European States—18. Quantum of salvage on recaptures—19. Recapture of neutral property—20. International law on salvage—21. Military and civil salvage—22. Special rules of military salvage—23. When original capture was unlawful—24. In case of ransom—25. A vessel recaptured by her master and crew—26. From pirates—27. By land forces in foreign ports—28. By native and allied armies in native ports.

Right of postliminy defined

§ 1. THE *jus postliminii* was a fiction of the Roman law by which persons, and, in some cases, things, taken by an enemy, were restored to their original legal *status* immediately on coming under the power of the nation to which they formerly belonged. '*Postliminium fingit eum qui captus est, in civitate semper fuisse.*' With respect to persons, the right of postliminy had a double effect, passive and active. *Passive*, inasmuch as the returned son fell again under the power of his parent, and the returned slave under the power of his master; and *active*, inasmuch as the returned person claimed to exercise his original rights over other persons or things. To produce this passive effect, the only requisite was the simple *return* of the individual; but to produce the active effect, the individual must have returned *legally* and *for the purpose* of regaining his rights. The *jus postliminii* was denied to those who illegally returned to their country during an armistice, to deserters, to those who had surrendered in battle, to those who had been abandoned by their country, or who had been the subject of a *deditio*, either during the war, or at the time of making peace.

With respect to things taken by the enemy, the Roman law considered them as withdrawn from the category of legal relations during the period of the enemy's possession of them. If retaken by their former owner, they became his by the recapture; but, if retaken by the State, they were considered as booty, or prize of war, the original right of property being extinguished by the intervening hostile possession. But certain things were excepted from this rule, as real property, horses, vessels used for purposes of war, &c.; and to these the *jus postliminii* was accorded. This general maxim of the Roman law, although not in all its details, is engrafted into modern international jurisprudence, and is fully recognised as an incident to the state of war, and contributes essentially to mitigate its calamities.[1]

Postliminy with regard to personal status and rights

§ 2. The right of postliminy is founded upon the duty of every State to protect the persons and property of its citizens against the operations of the enemy. When, therefore, a subject who has fallen into the hands of the enemy is rescued by the State or its agents, he is restored to his former rights and condition under his own State, for his relations to his own country are not changed either by the capture or the rescue. So, of the property of a subject recaptured from the enemy by the State or its agents; it is no more the property of the State than it was before it fell into the hands of the enemy; it must, therefore, be restored to its former owner. But if, by the well-established rules of public law, the title to the captured property has become vested in the first captor, the former owner cannot claim its restoration from the recaptor, because his original title has been extinguished.

The *jus postliminii* of the Roman law applied almost exclusively to questions of private rights, but the principles of natural justice embodied in that law are applicable to States as well as to individuals, in their intercourse with each other. It has, therefore, been held in modern times to extend not only to individuals of the same State, but also to individuals o different States, and to the international relations of States themselves.[2]

[1] Phillimore, *On Int. Law*, vol. iii. § 403; Justinian, *Institutes*, lib. i. tit. xii. § 5; Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 15; Kluber, *Droit des Gens*, §§ 256 et seq.

[2] Martens, *Précis du Droit des Gens*, § 283; Heffter, *Droit International*, §§ 187 et seq.; Voet, *Ad Pandect.*, tit. iv. p. 642; Pfeiffer, *Das*

Postliminy in regard to things

§ 3. Postliminy is considered as taking effect the moment that the persons, or property taken on land by an enemy, come within their sovereign's territory, or within places under his command, or into the hands of his officers or agents. But, in cases of prize and maritime recapture, the question of restoration usually involves that of military salvage, which must be determined by a court of competent jurisdiction. Vessels and goods taken by the enemy as prizes, and recaptured by the principal belligerent, or his allies, must, therefore, be brought *infra præsidia*, and adjudicated precisely the same as in case of a prize.[1]

Right of postliminy belongs exclusively to a state of war

§ 4. The right of postliminy belongs exclusively to a state of war, and no longer exists after the conclusion of a treaty of peace. The intervention of peace cures all defects of title to property of every kind, acquired in war, and such title cannot be subsequently defeated in favour of the original owner, not even in the hands of a neutral possessor, who himself becomes an enemy. Such property may be liable to capture as booty, or prize of war, the same as any other property of that neutral, now an enemy, but it is not affected by the right of postliminy. By the principle of *uti possidetis*, which, as already stated, applies to every treaty of peace, unless otherwise specially stipulated, all captured property is tacitly conceded to the possessor, and, if recaptured in a subsequent war, it is subject to the laws of capture, but not to those of postliminy. Nevertheless, there are many cases where, the treaty of peace being silent, and the principle of *uti possidetis* not applicable, it is necessary to resort to the *jus postliminii*, in order to determine the true condition of things *at the time* of the treaty, or the moment they were freed from the pressure of the captor's force, as an *enemy*; in other words, whether, when the captor ceases to be an enemy, the thing captured legally becomes his property, or returns to the former owner. Hence, the very intimate connection between treaties of peace and the rights of postliminy.[2]

Recht der Kriegseroberung, pp. 40 et seq.; Bello, *Derecho Internacional*, pt. ii. cap. iv. § 8.

[1] Vattel, *Droit des Gens*, liv. iii. ch. xiv. § 206; Kent, *Com. on Am. Law*, vol. i. p. 108; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. v.; Pando, *Derecho Púb. Int.*, p. 409.

[2] See *ante*, vol. i. ch. ix.; Phillimore, *On Int. Law*, vol. iii. § 539; Wheaton, *Elem. Int. Law*, pt. iv. ch. iv. § 4; the 'Purissima Concepcion, 6 *Rob.*, 45; the 'Sophia,' 6 *Rob.*, 138; Heffter, *Droit International*, § 188.

Postliminy in regard to allies

§ 5. It is a general rule of international law, that allies in war make but one party with the principal; the cause being common, the rights and obligations are the same. It follows, therefore, that when persons and things belonging to one of the allies, which have been taken by the enemy, fall into the hands of another ally, they are subject to the rights of postliminy, and must be restored to their former condition. The recapture by an ally is regarded the same as a recapture by the principal, and *vice versâ*. So, also, with respect to territory, persons and things brought within the territory of one ally are affected by the rights of postliminy precisely the same as if brought within the territory of their own sovereign. But, if the ally does not become an associate in the war, or a co-belligerent, and merely furnishes the succours stipulated by treaty, without coming to a rupture with the enemy, his dominions are regarded as neutral, and are governed by the laws of neutrality.

In a neutral territory

§ 6. The rights of postliminy, with respect to things, do not take effect in neutral countries, because the neutral is bound to consider every acquisition made by either party as a lawful acquisition, unless the capture itself is an infringement of his own neutral jurisdiction or rights. If one party were allowed in a neutral territory to enjoy the right of claiming goods taken by the other, it would be a departure from the duty of neutrality. Neutrals are bound to take notice of the military rights which possession gives, and which is the only evidence of right acquired by military force, as contradistinguished from civil rights and titles. The fact must be taken for the law. But with respect to persons, it takes effect, not only in the territory of the nation to which such persons belong, and in that of his allies, but also in a neutral country; so that if a belligerent brings his prisoners into a neutral territory he loses all control of them. So, if prisoners escape from their captors, and reach a neutral territory, they cannot be pursued and seized in such territory, and consequently are restored to their former condition. Prisoners of war who have given their parole may, or may not, claim the right of postliminy on reaching a neutral country, or coming again under the power of their own nation, according to the terms of their parole. If left entirely free to return to their own country, subject to certain stipulated conditions, such as not to serve again for a

certain period, or during the war, these conditions are not changed by recapture or rescue. But if they have only promised not to escape, or to remain within certain limits assigned to them, if they are rescued by their own party, or the place of their confinement falls into the hands of their own nation or its allies, they are released from their parole, and, by the right of postliminy, are restored to their former state. So if, by the incidents of the war, prisoners, not free to return to their own country, are brought into neutral territory, they are entitled to the benefit of that right. But it must be remembered, that prisoners brought into neutral ports on board a foreign ship of war, or any prize of hers, are not entitled to the right of postliminy, because such vessels in neutral ports have a right of extra-territoriality and such prisoners are not regarded as within neutral jurisdiction.[1]

Upon movables on land

§ 7. Naturally, property of all kinds is recoverable by the right of postliminy, and there is no intrinsic reason why movables should be excepted from the rule. Such, indeed, was the ancient practice, and by the *jus postliminii* of the Romans, certain articles, on being recovered from the enemy, were required to be restored to their former owners. But the difficulty of recognising things of this nature with any degree of certainty, and the endless disputes which would spring from a revendication of them, have introduced a contrary practice in modern times; and the title of the former owner to all *booty* is considered as completely divested by the captor, by a *deductio in locum tutum*, or by *deductio infra præsidia*, or by assignment to a neutral, or by a firm possession of the captor of twenty-four hours. Some apply the same rule to cases of *prize*, while others require the sentence of a competent court.

Upon real property

§ 8. Real property is easily identified, and is not of a transitory nature; it is, therefore, considered to be completely within the right of postliminy. The rule, however, cannot be frequently applied to the case of mere private property, which, by the general rule of modern nations, is exempt from

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. iv. § 4; Vattel, *Droit des Gens*, liv. iii. ch. vii. § 132; ch. xiv. §§ 208, 210; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. caps. xv. xvi.; Duponceau, *Translation of Bynkershoek*, note, pp. 116, 117; Cushing, *Opinions of U.S. Attys.-Gen.*, vol. vii. p. 123; Bello, *Derecho Internacional*, pt. ii. cap. iv. § 8; Heffter, *Droit International*, §§ 189, 190; the 'Purissima Concepcion,' 6 *Rob.*, 45; the 'Amistad de Rues,' 5 *Wheat. R.*, 390.

confiscation. There are some exceptions to this general rule, and wherever private real property has been confiscated by the enemy, and again comes into the possession of the nation to which the individual owner belongs, it is subject to the right of postliminy. The effect of complete conquest and retrocession will be considered in another paragraph. Grotius proposes the question with respect to the immovable property belonging to a prisoner of war, but situate in a neutral country. But Vattel summarily disposes of it with the just remark, that nothing belonging to a prisoner can be disposed of by the captor, unless he can seize it and bring it within his own possession. But the rule becomes of great practical importance when applied to questions arising out of alienations of real property belonging to the government, made by the opposite belligerent while in the military occupation of the country. We have already stated, that the purchaser of any portion of the national domain in the occupation of an enemy, previous to the confirmation or consummation of the conquest, takes it at the peril of being evicted by the original sovereign owner when he is restored to his dominions. But if the victor be so firmly established in possession, that opposition to his rule is overcome or virtually ceases, or if the conquest is accompanied by internal revolution and a recognition of the new government—in other words, if the conquest is legally complete—alienations of the public domain will not be annulled, even though the former sovereign should be restored.[1]

[1] Vattel, *Droit des Gens*, liv. iii. ch. xiv. § 212; Kent, *Com. on Am. Law*, vol. i. pp. 108, 109; Lieber, *Political Ethics*, b. ii. § 86; Phillimore, *On Int. Law*, vol. iii. §§ 406, 539–574, 583; *vide ante*, chapters xxxiii. and xxxiv.

The courts of the United States have determined, that grants of territory made by Great Britain, after the Declaration of Independence, are invalid. In the case of Harcourt *v.* Gaillard (7 *Curtis R.*, 332), concerning a piece of land, lying between the Mississippi and Chatahouchee rivers and granted under the above circumstances, it was laid down by the Supreme Court as follows:—'Two questions here occur: first, whether this separation has taken effect by any valid act; and, secondly, if it had, whether it made any difference in the case upon international principles. On both these points we are of opinion that the law is against the validity of this grant. It is true that the power of the Crown was at that time admitted to be very absolute over the limits of the royal provinces; but there is no reason to believe that it had ever been exercised by any means less solemn and notorious than a public proclamation. And although the instrument by which Georgia claimed an extension of her limits to the northern boundary of that territory was of no more authority or solemnity than that by which it was supposed to have been taken from her, it was

Upon towns and provinces

§ 9. Towns, provinces, and territories, which are retaken from the conqueror during the war, or which are restored to their former sovereign by the treaty of peace, are entitled to the right of postliminy, and the original sovereign owner on recovering his dominion over them, whether by force of arms or by treaty, is bound to restore them to their former state. In other words, he acquires no new rights over them either by the act of recapture or of restoration. The conqueror loses the rights which he had acquired by force of arms; but those rights are not transferred to the former sovereign, who resumes his dominion over them precisely the same as though the war had never occurred. He rules, not by a newly-acquired title, which relates back to any former period, but by his ancient title, which, in contemplation of war, has never been divested. The places which are reconquered or restored therefore return to him with the rights and privileges which they would have possessed if they had never fallen into the power of the enemy. 'The conqueror,' says Calvo, 'who only occupies a territory, does not thereby become its sovereign, and in consequence has neither the right of alienating its public domain, nor of contracting engagements in its name. His rights are

otherwise with South Carolina. Her territory had been extended to that limit by a solemn grant from the Crown, to the lords proprietors, from whom, in fact, she had wrested it by a revolution, even before the right of the proprietors had been bought out by the Crown. But this is not the material fact in the case; it is this: that this limit was claimed and asserted by both of those States in the Declaration of Independence, and the right to it was established by the most solemn of all international acts, the treaty of peace. It has never been admitted by the United States that they acquired anything by way of cession from Great Britain by that treaty. It has been viewed only as a recognition of pre-existing rights, and on that principle the soil and sovereignty within their acknowledged limits were as much theirs at the Declaration of Independence as at this hour. By reference to the treaty, it will be found that it amounts to a simple recognition of the independence, and the limits of the United States, without any language purporting a cession or relinquishment of right on the part of Great Britain. In the last article of the Treaty of Ghent will be found a provision respecting grants of land made in the islands then in dispute between the two States, which affords an illustration of this doctrine. By that article, a stipulation is made in favour of grants before the war, but none for those which were made during the war; and such is unquestionably the law of nations. War is a suit prosecuted by the sword, and where the question to be decided is one of original claim to territory, grants of soil made *flagrante bello* by the party that fails can only derive validity from treaty stipulations. It is not necessary here to consider the rights of the conqueror in the case of actual conquest, since the views previously presented put the acquisition of such rights out of this case.'

limited to the exercise alone of that authority which is required for military operations. This doctrine appears to have prevailed at the close of the last war between France and Prussia, 1871. The Prussians had entered into contracts with certain persons to permit them to cut wood in the French public forests, notably in those near Nancy. Some of these fellings not having been made when the treaty of peace was signed, the above persons, who had paid the price of their wood in vance to the German authorities, claimed that their contracts were still valid and obligatory as against France, and that they were at liberty to continue their fellings. The French government refused to allow the work to be continued; and it was specially declared, with the assent of Germany, on December 11, 1871, in an additional article to the treaty of peace, that France did not recognise the contracts as of legal value or binding force, and repudiated all responsibility, pecuniary or otherwise, that the above parties might desire to throw on her.'[1]

But if the conquered provinces and places are confirmed to the conqueror by the treaty of peace, or otherwise, they can claim no right of postliminy. Their condition is established by the rights of conquest, and the will of the conqueror. The right or title of the new sovereign is not that of the original possessor, and therefore is not subject to the same limitation or restriction. It had its origin in force, and is confirmed by treaty, incorporation, length of possession, or otherwise. It dates back to the actual conquest, but not to any period anterior to the conquest. The relations between the conquered and the conqueror are therefore very different from those which existed between the conquered and their former sovereign. They have, in their new condition, such rights only as belong to them by the general law of nations, and the stipulations of the treaty of cession, or such others as may be given to them by the will of the conqueror. If, however, the provinces and places have not themselves been considered as having been in a hostile attitude to the conqueror, he is regarded as merely replacing the former sovereign in his rights over them. They are regarded as acquired by conquest, rather than as actually conquered, and, in such cases, the acquisition or change of sovereignty is not usually attended by loss of rights,

[1] Calvo, *On Int. Law*, tome ii. § 1324.

But in whatsoever way the conquest is complet ɯ it operates as an entire severance of the relations between the conquered territory and the former sovereignty. A subsequent restoration of such territory to its former sovereign is regarded in law as a *retrocession*, and carries with it no rights of postliminy. When the inhabitants of such conquered territory become a part of the new State they must bear the consequence of the transfer of their allegiance to a new sovereign; and, should they subsequently fall into the power of their former sovereign, he is, in turn, to be regarded as a conqueror, and they cannot claim, as against him, any rights of postliminy. The correctness of the principle of international law, as stated above, is never disputed; but there is great difficulty in determining when the conquest is complete, or in drawing the precise line between absolute conquest and mere military occupation. This distinction has been discussed in chapters xxxiii. and xxxiv.[1]

If a State be entirely subjugated

§ 10. A State is sometimes entirely subjugated and its personality extinguished by a compulsory incorporation into another sovereignty. As the towns, provinces, and territories of which it was composed now become subordinate portions of another society, their relations to each other and to the new State result from the will of the new sovereign. If, by a subsequent revolution, the extinguished State resumes its independence, and again becomes a distinct and substantive body, its constituent parts may resume their former relations, or assume new positions and rights, according to the character of the society which is recognised, and the constitution or government which it adopts. This is a question of local public law, rather than of international jurisprudence. But if the subjugated State is delivered by the assistance of another, the question of postliminy may arise between the restored State and its deliverer. There are two cases to be considered: first, where the deliverance is effected by an ally, and second, where it is effected by a friendly power unallied. In either case, the State so delivered is entitled to the right of postliminy. If the deliverance be effected by an ally, the duty of

[1] Heffter, *Droit International*, § 188; Chitty, *Law of Nations*, pp. 95, 96; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. xvi.; Bello, *Derecho Internacional*, pt. ii. cap. iv. § 8; Rayneval, *Inst. du Droit Nat.*, liv. iii. ch. xviii.

restoration is strict and precise, for an ally can claim no right of war against its co-ally. If the deliverance be effected by a State unallied but not hostile, the re-establishment of the rescued nation in its former rights is certainly the moral duty of the deliverer. He can claim no rights of conquest against the friendly State which he rescues from the hands of the conqueror. How much stronger, then, is the duty of restoration where the deliverance is effected with the concurrence and assistance of the subjugated people, and under the expectation on their part of recovering their ancient rights and privileges. A denial of the right of postliminy, in such a case, would be contrary to the law of nations and a breach of public morality.[1]

Case of Genoa in 1814

§ 11. The history of Genoa furnishes an illustration of this principle. The ancient republic of Genoa had been subverted, in consequence of the French invasion and conquest of Italy, and was annexed to the French empire in 1805. In 1814 the city of Genoa was surrendered to the British troops, under the command of Lord Bentinck, who issued a proclamation on April 26, stating 'that, considering the general desire of the Genoese seems to be to return to that ancient form of government under which it enjoyed liberty, prosperity, and independence; and considering, likewise, that this desire seems to be conformable to the principles recognised by the high allied powers, of restoring to all their ancient rights and privileges,' and declaring 'that the Genoese State, as it existed in 1797, with such modifications as the general wish, the public good, and the spirit of the original constitution seem to require, is re-established.' Nevertheless, by the second article of the treaty of Paris, of May 30, 1814, the States of Genoa were ceded to the King of Sardinia. The provisional government of Genoa remonstrated against this cession, and appealed to the guarantee of its independence contained in the treaty of Aix-la-Chapelle, 1745. The conduct of England was severely censured in Parliament at the time, and has since been condemned by publicists generally.[2]

[1] Puffendorf, *De Jure Nat. et Gent.*, lib. viii. cap. vi. § 26.

[2] Wheaton, *Hist. Law of Nations*, pp. 487, 488; Kluber, *Acten des Wiener Congresses*, b. vii. §§ 420-433; Mackintosh, *Miscell. Works*, pp. 508-524; Alison, *Hist. of Europe*, vol. iv. pp. 370, 503; Rotteck, *Hist. of the World*, vol. iv. p. 248; *Annual Register*, 1814, p. 191; Hansard, *Parliamentary Debates*, vol. xxx. pp. 894 et seq.

Application of postliminy to maritime captures

§ 12. Having considered the law of postliminy applicable to the retaking of movable and immovable property captured on land, it remains to examine its application to the retaking of prizes, or property captured at sea,—what was called in Latin *recuperatio*, and is known in English law as *recapture*. There is a manifest difficulty in applying the right of postliminy to maritime recaptures, on account of the uncertainty of the time when the title of the original proprietor is completely divested. If all nations had, by their municipal laws, adopted the principle, that condemnation, by a competent court of prize, was necessary, in all cases, to effect a change of ownership, the rules of postliminy applicable to prizes would be the same in all countries; but, as this principle has not been universally adopted, there is not, in practice, any well-established rule of maritime recapture. Different text-writers have advocated different principles, and different legislators have enacted different laws, and, as a consequence, the prize courts of different countries have adopted different rules of decision.[1]

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 12; Bello, *Derecho Internacional*, pt. ii. cap. v. § 6; Heffter, *Droit International*, § 191; Hautefeuille, *Des Nations Neutres*, tit. xiii. ch. iii.; Jouffroy, *Droit Maritime*, p. 313; Poehls, *Seerecht*, &c., b. iv. §§ 509 et seq.; Kaltenborn, *Seerecht*, &c., b. iii. p. 378; Dalloz, *Répertoire*, verb. 'Prises Maritimes,' § 3; Pistoye et Duverdy, *Des Prises*, tit. viii.

There is one species of recapture from the enemy which vests the whole interests in the recaptors—viz. when an enemy's ship, taken originally by one English vessel, and lost again to an enemy's cruiser, is subsequently recaptured by another English vessel. (Note to the 'John and Jane,' 4 *Rob.*, 217.)

By virtue of 7 Edw. IV., c. 14, a recaptured vessel belonged neither to the king, the admiral, nor the former owners, but to the recaptors (Weston's case, 2 *Brownl.*, 11), unless the owner claimed it on the day on which it was retaken, and *ante occasum solis* (*Jenk.*, 201; *Pl.*, 22). So also as to recaptured ships, the property of allies of Great Britain, and retaken by British subjects from a common enemy. (*Ibid.*)

If a ship be taken by letters of marque, and be not brought *infra præsidia* of that State by whose subjects it was taken, it is no lawful prize, and the property is not altered, and therefore a sale in such a case is void. (Anon., 6 *Vin. Abr.*, 519.)

It was not essential, to constitute a capture, or such a one as to give occasion to a recapture under the former Prize Acts of Great Britain, that the enemy should have taken actual possession. (The 'Edward and Mary,' 3 *Rob.*, 305.)

In questions of restitution of property recaptured, the *onus probandi* in the first instance lies on the recaptors, to show the absence of reciprocity as to restitution, by the laws of the claimant's country, but on *primâ facie* evidence being shown by the recaptors, the *onus* of proof of reciprocity shifts to the claimant. (The 'Santa Cruz,' 1 *Rob.*, 60.)

In a cause of possession, at the suit of the former British owner of a

§ 13. It is remarkable that of all the ancient codes of maritime law—the Consolato del Mare, the Rôle des Jugements d'Oleron, the Laws of Wilsby, the ancient Statutes of Hamburg, Lübeck, Bremen, and the Hanse Towns—the Consolato del Mare alone deals with the case of recaptures. The doctrine of *perductio infra præsidia*, as constituting a sufficient conversion of property, is there expressed, but not in terms very intelligible in themselves. These terms, however, have been satisfactorily explained by Grotius and Barbeyrac, and the whole subject has been most ably discussed by Bynkershoek. Nevertheless, it was left unsettled whether the right of postliminy should apply to all maritime recaptures, or only to ships; whether they must be taken *infra præsidia* of the captor, or whether the bringing *infra præsidia* of a neutral was sufficient to change the property; moreover, it was often a matter of dispute what should be understood by the phrase *infra præsidia*. This state of the question led to various treaty stipulations and municipal statutes, by which the subject of recapture was regulated with respect to the contracting parties and their own subjects; and with respect to countries with which the recaptor had no treaty in relation to the application of postliminy to such cases, the courts have sometimes adopted the rule of reciprocity. Sir William Scott considers this the most liberal and rational rule which can be applied. 'To the recaptured,' he says, 'it presents his own consent, bound up in the legislative wisdom of his own country; to the recaptor, it cannot be considered as injurious, where the rule of the recaptured would condemn, whilst the rule of the recaptor prevail-

Text-writers and prize courts

vessel which had been captured by the French, and carried into a port of Spain, then an ally of the French, where she was condemned by the prize tribunal at Paris, but was afterwards seized by Spain on becoming an enemy of France, and sold, it was held, on proof of such first sale, that the right of the former British owner was divested, and that the Spanish seizure was not in the nature of a recapture enuring to the benefit of the former British owner. (The 'Victoria,' *Edw.*, 97.)

Where a British vessel has been seized in a French port for an asserted violation of French municipal laws, condemned, and sold under that sentence to a French merchant, and afterwards recaptured on the breaking out of a war between France and England, it was held that it could not be restored on salvage to the former British proprietor: the restitution to the former owner mentioned in the Prize Act being confined to property taken by the enemy as prize. (The 'Jeune Voyageur,' 5 *Rob.*, 1.)

The French Prize Court decided in 1802 that a belligerent is not bound to accept any notification of the cessation of hostilities, unless it be communicated to him by his own government. See the 'Swineherd,' Merlin, *Répert. de Jurisprudence*, vol. xiii. p. 183.

ing amongst his own countrymen, would restore, it brings an obvious advantage; and even in case of immediate restitution, under the rules of the recaptured, the recapturing country would rest secure in the reliance of receiving reciprocal justice in its turn. It may be said, what if this reliance should be disappointed? Redress must then be sought for retaliation, which, in the disputes of independent States, is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution. This will be their ultimate security, and it is a security sufficient to warrant the trust. For the transactions of States cannot be balanced by minute arithmetic; something must, on all occasions, be hazarded on just and liberal presumption.'[1]

Regulated in part by treaty stipulations

§ 14. Every power is obliged to conform to the law of nations, relative to postliminy, where the interests of neutrals are concerned, unless otherwise regulated by treaty stipulations. But such conventions or treaty stipulations establish a factitious right, which relates only to the contracting parties, and cannot bind others. So, with respect to allies, two allies may enter into an agreement by which the rights of postliminy may be restricted or extended, as between themselves, but such agreement can in no way affect the rights of postliminy of the third co-ally, who is not a party to it. His rights and duties in that respect are governed and regulated by the rules of postliminy, which are recognised and established by the law of nations. But, in many cases, as already remarked, there is no recognised and well-established rule of international law, which can be applied. So of municipal laws, they may modify the right of postliminy in its application to cases arising between the subjects of the same belligerent State, but they cannot change it so as to prejudice the absolute rights of citizens of other States, whether allies or neutrals. In other words, municipal statutes cannot deprive the subject of an ally of the benefit of postliminy, in case of recapture, nor take from the subject of a neutral State what he holds by a title, which is regarded as valid by the law of nations. They may, however, give to both certain benefits of postliminy, which they could not claim under the well-established principles of the law of nations as absolute rights. Such has been the

[1] The 'Santa Cruz,' 1 *Rob.*, 63; Goss et al. *v.* Withers, 2 *Bur. R.*, 693; Loccenius, *De Jure Maritimo*, lib. ii. cap. iv.

general character of the modifications of postliminy which have been made, or attempted, by municipal laws and regulations.

Laws of Great Britain

§ 15. The established doctrine of English prize law is, that so long as the captured property continues in the hands of the enemy the original rights of the British owner are kept alive, and rendered capable of resumption on payment of salvage when the event of recapture takes place. If at the time when a prize ship is retaken it is clearly in the possession of a citizen of the enemy's country, the owner has a right to receive his property again, on payment of salvage, and this whether there has been a sentence of condemnation in the enemy's court or not. But if a sale to a neutral has taken place, that sale, joined to the sentence of the enemy's court, will bar all claim of the original British owner against the neutral for restitution on salvage.[1] Restitution upon salvage of British property retaken from the enemy appears to have been the constant practice in the Admiralty of England;[2] but in order to secure this benefit it was formerly necessary that the property should be recaptured within twenty-four hours, or within certain limitations. But during the English Commonwealth, when commerce began to expand, this rule was receded from; and in 1649 restitution upon salvage without regard to time was enacted by an Ordinance of the Long Parliament in favour of British subjects. The ancient practice, however, continued, and still prevails in those cases where the enemy has fitted out the prize as a ship of war. By the Naval Prize Act, 1864 (27 and 28 Vict., cap. 25), it is enacted (s. 40) that 'where any ship or goods belonging to any of her Majesty's subjects, after being taken as prize by the enemy, is or are retaken from the enemy by any of her Majesty's ships of war, the same shall be restored by decree of a prize court to the owner, on his paying as prize salvage one-eighth part of the value of the prize, to be decreed and ascertained by the court, or such sum not exceeding one-eighth part of the estimated value of the prize as may be agreed on between the owner and the recaptors, and approved by order of the court; provided, that where the recapture is made under circumstances of special difficulty or danger, the prize court may, if it thinks fit, award to the recaptors as prize salvage a larger part than

[1] The 'Cornelia,' *Edw. R.*, 244.

[2] *Life of Sir L. Jenkins*, vol. ii. p. 770; the 'Ceylon,' 1 *Dods. R.*, 109.

one-eighth part, but not exceeding in any case one-fourth part of the value of the prize; provided also, that where a ship being so taken *is set forth*, or used by any of her Majesty's enemies as a ship of war, this provision for restitution shall not apply, and the ship shall be adjudicated on as in other cases of prize.' And (by s. 41) 'where a ship belonging to any of her Majesty's subjects, after being taken as prize by the enemy, is retaken from the enemy by any of her Majesty's ships of war, she may, with the consent of the recaptors, prosecute her voyage, and it shall not be necessary for the recaptors to proceed to adjudication till her return to a port of the United Kingdom. The master or owner, or his agent, may, with the consent of the recaptors, unload and dispose of the goods on board the ship before adjudication. In case the ship does not, within six months, return to a port of the United Kingdom, the recaptors may nevertheless institute proceedings against the ship or goods in the High Court of Admiralty, and the court may thereupon award prize salvage as aforesaid to the recaptors, and may enforce payment thereof, either by warrant of arrest against the ship or goods, or by monition and attachment against the owner.'

It should be observed that a sentence of condemnation of a prize court is a sufficient title to a vendee who is not a British subject, and entitles a recaptor to condemnation of the property so far as the above statute does not step in and, *as to British subjects*, revive the *jus postliminii* of the original owner, on payment of salvage. This principle would extend to allies and neutrals the benefit of postliminy until *after* condemnation, if the courts had not engrafted on it the rule of reciprocity alluded to by Sir William Scott.[1]

[1] The 'Santa Cruz,' 1 *Rob.*, 63. Recaptures are emphatically cases of prize; for the definition of prize goods is, that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy. When so taken, the captors have an undoubted right to proceed against them as belligerent property, in a court of prize; for in no other way, and in no other court, can the question presented on a capture *jure belli* be properly or effectually examined. The very circumstance that it is found in the possession of the enemy, affords *primâ facie* evidence that it is his property. The question cannot be decided, unless the customary proceedings of prize are instituted, and enforced. The court, then, has a legitimate jurisdiction over the property of prize; and, having it, well exert its authority over all the incidents. It will decree a restoration of the whole, or of a part; it will decree it absolutely, or burthened with salvage, as the circumstances of the case may require; and whether the salvage be held a portion of the thing itself, or a mere lien upon it, or a condition

Laws of the United States

§ 16. The United States, by the Act of June 30, 1864 (ch. 174, s. 29), have enacted 'that when any vessel or other property shall have been captured by any force hostile to the United States, and shall be recaptured, and it shall appear to the court that the same had not been condemned as prize before its recapture, by any competent authority, the court shall award a meet and competent sum as salvage, according to the circumstances of each case; and if the captured property belonged to the United States, it shall be restored to the United States, and there shall be paid from the Treasury of the United States the salvage, costs, and expenses ordered by the court; and if the recaptured property belonged to persons residing within or under the protection of the United States, the court shall adjudge the property to be restored to its owners upon their claim, on the payment of such sum as the court may award as salvage, costs, and expenses; and if the recaptured property belonged to any person permanently resident within the territory, and under the protection of any foreign prince, government, or State in amity with the United States, and by the law or usage of such prince, government, or State the property of a citizen of the United States would be restored under like circumstances of recapture, it shall be adjudged to be restored to such owner upon his claim, upon such terms as by the law or usage of such prince, government, or State would be required of a citizen of the United States under like circumstances of recapture; and when no such law or usage shall be known, it shall be adjudged to be restored upon the payment of such salvage, costs, and expenses as the court shall order: provided, that nothing in this Act shall be construed to contravene any treaty of the United States. And the whole amount awarded as salvage shall be decreed to the captors, and no part to the United States, and shall be distributed as in the case of proceeds of property condemned as prize.'[1]

The same provisions are made in the British and American statutes, with respect to the *setting forth as a vessel of war,*

annexed to its restitution, it is an incident to the principal question of prize, and within the scope of the regular prize allegation. (The 'Adelina,' 9 *Cranch.*, 244, 286; compare the 'Dove,' 1 *Gall.*, 585.)

[1] *U.S. Stat. at Large*, 314. This Act repeals the Act of March 3, 1800. The rule of section 1 of that statute, which provided for the restoration to the former owners, upon the payment of certain salvage, of vessels re-

prior to the capture. We know of no American decision as to what constitutes such *setting forth*, but the meaning of the term has been fully settled by adjudications in the British prize courts. It has been decided that a commission of war is sufficient, if there be guns on board; that where the vessel has been fitted out as a privateer, after capture, although when recaptured she was navigating as a merchant vessel, it is conclusive against her, and the title of the former owner is considered as for ever extinguished. So where she has been employed in the military service of the enemy, by authority of the government, although she be not regularly commissioned, and the order of the commander of a single ship will be presumed to have been given by competent authority. But the mere fact of employment in the military service of the enemy is not a sufficient *setting forth* as a vessel of war. Where a ship was originally armed for the slave trade, and, after capture, an additional number of men were put on board, but where there was no commission of war and no additional arming, it was held not to be a setting forth as a vessel of war, under the Act. Lord Stowell observed, that the Prize Act was drawn with the intention of expressing the sense and meaning of international law, with respect to what constitutes a vessel of war.[1]

Laws of different European States

§ 17. Although the letter of the French ordinances, previous to the Revolution, condemned, as good prize, French property recaptured after being twenty-four hours in possession of the enemy, whether the same be retaken by public or private armed vessels, yet it was the constant practice to restore

captured, before condemnation, by public armed ships of the United States, was held to apply to a vessel recaptured after a capture by a Confederate privateer, and a condemnation and sale by a Confederate prize court. (The 'Lilla,' 2 *Sprague*, 177; 15 *Law Rep.*, N.S., 81.) An American vessel was captured by the enemy, and, after condemnation and sale to a subject of the enemy, was recaptured by an American privateer. Held, that the original owner was not entitled to restitution on payment of salvage, under that statute, nor under the Prize Act of June 26, 1812. (The 'Star,' 3 *Wheat.*, 78.)

[1] The 'Actif,' *Edw. R.*, 185; the 'Santa Brigada,' 3 *Rob.*, 56; the 'Georgiana,' 1 *Dod. R.*, 397; the 'Nostra Señora de Rosario,' 3 *Rob.*, 10; the 'Progress,' *Edw. R.*, 210, 222. The fact of the enemy having placed an additional number of men on board a prize, previously armed as a slave ship, without her being commissioned by them as a ship of war, or further armed, was held, not to amount to a *setting forth* of the prize, as a ship of war by the enemy, within the meaning of the then existing Prize Act, so as to defeat the title of the former owner. Restitution to him, on salvage, decreed accordingly. (The 'Horatio,' 6 *Rob.*, 320.)

such property when recaptured by the king's ships. By the ordinance of June 15, 1779, all French property recaptured after twenty-four hours' possession by the enemy was condemned to the crown, the king in council regulating the amount of salvage to be allowed to the recaptors according to circumstances. The Arrêté du 2 Prairial, an XI, which was, in part, a reproduction of the ordinances of 1681, provided that if the recapture be made by a public ship of war (*bâtiment de l'Etat*), it should be restored to the original proprietors, on payment, to the recapturing crew, of the thirtieth part of the value if the twenty-four hours have not elapsed, and of the tenth part if they have elapsed; all the expenses incident to the recapture to be borne by the recaptured vessel. If the recapture be made by a privateer before the twenty-four hours had elapsed, she was entitled to one-third of the value of the recaptured ship and cargo; and if after the twenty-four hours' possession, to the whole. The law applicable to the recapture of a French vessel equally applied to the recapture of the vessel of an ally. The laws of Spain with respect to recaptures generally agree with those of France. In 1801 she made a rule with respect to the property of friendly nations, that where the recaptured ship was not laden for the enemy's account, it was to be restored upon the payment of a salvage of one-eighth if recaptured by public ships, and one-sixth if by privateers; provided, that the nation to which such property belonged had adopted, or agreed to adopt, a similar conduct towards Spain. The rule with respect to recaptures of Spanish property was the same as the French rule with respect to recaptures of French privateers. On February 5, 1814, Spain concluded a treaty with Great Britain with respect to recaptures, by which restoration was to be made on the payment of the specified salvage, without reference to the time the ship had remained in the captor's hands, or whether it had been brought into the port of the captor or been condemned. Portugal, in her ordinances of 1704 and 1796, adopted the French and Spanish law of recaptures; but in May 1797 she revoked her former rule by which twenty-four hours' possession by the enemy divested the property of the former owner, and allowed restitution after that time, on salvage of one-eighth if recaptured by a public ship, and one-fifth if by a privateer. The ancient law of

Denmark condemned after twenty-four hours' possession by the enemy, and restored if the property had been a less time in the enemy's possession, upon the payment of a salvage of one-half the value of the property recaptured; but the ordinance of 1810 restored Danish, or allied property, without regard to the time it had been in the enemy's possession, on the payment of salvage of one-third the value. With respect to Sweden, the ordinance of Charles XI. enacted, 'that in case a ship belonging to Swedish subjects, after having been taken by the enemy, should be retaken, the recaptor should have two-thirds of its value, and a third should be restored to the proprietor, without respect to the time during which it might have been in the enemy's hands. The ordinance of 1788 made the same provisions, only changing the rate of salvage to one-half of the value of the property recaptured. There were many and great variations in the laws promulgated, at different times, by the States-General of the United Provinces. The ordinance of 1659, without making any distinction between the times of recapture and the quality of the recaptors, allowed a salvage of only one-ninth of the vessel and cargo. But the ordinance of 1677 directed, with respect to privateers, that a salvage of one-fifth should be allowed in case of recapture before the property had been forty-eight hours in the enemy's possession, of one-third if more than forty-eight and less than ninety-six hours, and one-half if beyond that time. It was understood that the ordinance of 1659 was continued in force with respect to recaptures made by ships of war. It is thus seen that the States-General allowed restoration in all cases, the rates of salvage being different according to the character of the recaptor and the length of time the captured property had remained in the possession of the enemy.[1]

[1] The 'Santa Cruz,' 1 *Rob.*, 58; Hautefeuille, *Des Nations Neutres*, tit. xiii. ch. iii.; Emerigon, *Traité des Assurances*, ch. xii. § 23; Azuni, *Droit de la Mer*, pt. ii. ch. iv. § 11; Pistoye et Duverdy, *Des Prises*, tit. vii.; Abreu y Bertodano, *Coleccion*, &c., pt. ii. p. 371; Martens, *Essai sur Armateurs*, pp. 49, 200; Bynkershoek, *Quæst. Jur. Pub.*, lib. i. cap. 5. An American ship was taken by a privateer, A., who kept possession ten days, when the prize was retaken by an American cruiser, B., who kept possession thirteen days. It was then again recaptured by a British cruiser, C., at the time of whose recapture of her the prize master and crew of A., the first captor, were on board the prize. Held that A. was to be considered as the actual captor, and C. as the recaptor. Sentence accordingly; salvage awarded to the recaptor equivalent to the share of a joint captor. (The 'Lucretia,' *Hay and Marriott*, 227.)

Quantum of salvage on recaptures

§ 18. It appears from the foregoing synopsis of the laws of recapture, that there has been no uniform or fixed rule as to the *quantum* of salvage to be allowed in cases of recapture of a foreign vessel or foreign goods. This is still the case, the rates being different in different countries, and even in the same country. In the United States the amount of salvage is regulated by the law and usage which the government to which the person claiming the vessel or goods belongs applies, under like circumstances, to the vessels and goods of the United States; and where no such law or usage is known, the same salvage is allowed as in the case of recapture of the property of its own citizens. In France, and other States on the Continent, the rate of salvage varies with the length of time the property recaptured has been in the enemy's possession. A distinction is also made in the rate of salvage allowed to a privateer and to a government vessel, the allowance to the former being usually much larger than to the latter. It being the duty of every citizen to assist his fellow citizens in war, and to retake their property out of the enemy's possession, no commission is necessary, and non-commissioned vessels are usually allowed the same amount of salvage on a recapture as commissioned vessels.[1]

Recapture of neutral property

§ 19. Neutral property recaptured from the enemy, if not subject to condemnation by the rules of international law, is not subject to pay salvage to the recaptor. This rule is founded upon the supposition that justice would have been done if the vessel had been carried into the enemy's port, and that if injury had been sustained by the act of capture, it would have been redressed by the tribunal of the country to whose cognisance the case would have been regularly submitted. This is a presumption which is to be entertained in favour of every State which has not sullied its character by gross violations of the law of nations. Thus, a Spanish vessel, bound from Monte Video to London, was recaptured from a French privateer, after recapture from a British privateer. No edict was produced from the French code to show that the vessel would have been subject to condemnation in a

[1] The 'Robert,' 3 *Rob.*, 194; the 'Helen,' 3 *Rob.*, 224; the 'Urania,' 5 *Rob.*, 148; the 'Progress,' *Edw. R.*, 215; the 'Hope,' *Hay and Marriott, R.*, 216; the 'Two Friends,' 1 *Rob.*, 271; the 'Mary,' 5 *Rob.*, 200; Talbot *v.* Seaman, 1 *Cranch. R.*, 1; the 'Adeline,' 2 *Cranch. R.*, 244, 287.

prize court of France, and salvage was pronounced not to be due. But if it be shown that the recaptured vessel of the neutral would, in all probability, have been condemned if she had been carried into the enemy's ports and subjected to the decisions of the enemy's tribunals, a real benefit has been conferred upon the neutral by the recapture, and a reasonable salvage will be allowed. Thus, where a neutral vessel, retaken from a French captor, was bound to a neutral port without certificates of origin on board, salvage was allowed on the ground that she would have been condemned by a French prize court. So where the recaptured vessel would have been liable to condemnation under the French decrees prohibiting neutral trade with Great Britain.[1]

International law on salvage

§ 20. The allotment of salvage, where the recaptured property is claimed by subjects of the same State, is properly regulated by municipal law; but where it is claimed by subjects of allies or alien friends, the allotment of military salvage is properly a question of international law; so, also, of civil salvage, where the *quantum meruit* is the only rule for apportioning the remuneration. But, as already remarked, there being no well-established rule of international law universally acknowledged, with respect to the legal *status* of captured property, between the time of pernoctation, or twenty-four hours' possession, and the condemnation by a competent court of prize, restitution, in case of recapture between these periods, is not regarded as a matter of strict right, but, in a measure, one of favour and relaxation; and the belligerent recaptor

[1] Kent, *Com. on Am. Law*, vol. i. p. 112; Phillimore, *On Int. Law*, vol. iii. § 422; Pistoye et Duverdy, *Des Prises*, tit. vii. ch. ii.

A vessel which had been used by the enemy, without the knowledge of her owners, and had been recaptured from the enemy, was restored by consent, with costs to the libellants, in the case of the 'Henry C. Brooks' (*Blatchf. Pr. Cas.*, 99). A neutral vessel recaptured from the enemy may, if necessary for mutual safety and interest of herself and the recaptors, be equipped, armed, and employed at her own risk in protecting herself and the recaptors from the attack of the enemy's cruisers. The claim of the neutral owners for restitution in value, in consequence of their ship having become a wreck whilst and in consequence of being so employed, was pronounced against, affirming the sentence of the Vice-Admiralty Court of Jamaica. (The 'Swift,' *Acton*, 1.) Recaptors are under a responsibility to restore the property of allies and neutrals, and this responsibility will exonerate the original captors, unless it can be shown that the original captors so dealt with the property and accompanying documents, that it could not be ascertained to be neutral, on the just and uniform principles of the Law of Nations, when it came into the prize court of the recaptors. (The 'Betsey,' 1 *Rob.*, 96.)

certainly is justifiable in annexing conditions to his liberality. But where the restitution is regarded as a positive obligation on the part of the recaptor, and as a right which may be demanded by the owner of the recaptured property, it seems unreasonable and contrary to the principles of postliminy, that any heavy salvage should be allowed. Where, however, a positive benefit has been conferred, it is proper that the recaptor should be rewarded for his risk and trouble. Moreover, this remuneration should be sufficient to serve as an incentive to vessels of the belligerent to use their best endeavours to rescue from an enemy the property which he has captured from their own citizens and allies, as well as from alien friends. Such views seem to have influenced the drafting of the Statutes of the United States, on the allotment and *quantum* of salvage in cases of recapture by American vessels.[1]

Military and civil salvage

§ 21. There is an obvious distinction between *military* and *civil* salvage, the former being allowed for rescuing vessels or goods from an enemy, and the latter for assistance rendered to a vessel or its cargo derelict at sea. Thus if a vessel be captured going in distress into an enemy's port, and is thereby saved, it is merely a case of civil and not of military salvage. The same salvors, however, may, in some cases, be entitled to both these kinds of salvage; thus, where, upon a recapture, the parties have entitled themselves to a *military* salvage under the prize law, the court may also award them, in addition, a *civil* salvage, if they have subsequently rendered extraordinary services in rescuing the vessel in distress from the perils of the sea.[2]

Special rules of military salvage

§ 22. The following special rules respecting military salvage are collected by Wheaton from the decisions of English and American courts of prize. If a convoying ship recaptures one of the convoy, which has been previously captured by the enemy, the recaptors are entitled to salvage; but a mere rescue of a ship engaged in the same common enterprise gives no right to salvage. Military salvage will not be allowed in any case where the property has not been actually rescued from the enemy. It is not necessary that the enemy should have

[1] Chitty, *Law of Nations*, pp. 105–107; the 'Two Friends,' 1 *Rob.*, 271; the 'Johann,' 1 *Rob.*, 38; *U. S. Statutes at Large*, vol. ii. p. 16.

[2] The 'Louisa,' 1 *Dod. R.*, 317; the 'Franklin,' 4 *Rob.*, 147; the 'Sir Francis,' 2 *Hagg. R.*, 156; the 'Sir Peter,' 2 *Dod. R.*, 73; the 'Beaver,' 3 *Rob.*, 292.

actual possession; it is sufficient if the property is completely under his dominion: nor is it necessary that the recaptors should have actual possession; it is sufficient if the prize be actually rescued from the grasp of the hostile captor. Where a hostile ship is captured, and afterwards recaptured by the enemy, and again recaptured from the enemy, the original captors are entitled to restitution on paying salvage, but the last captors are entitled to the whole rights of prize, for by the first recapture the right of the original captors is entirely divested. Where the original captors have abandoned their prize, and it is subsequently captured by other parties, the latter are solely entitled to the property. But if the abandonment be involuntary, and produced by the terror of superior force, and especially if produced by the act of the second captors, the rights of the original captors are completely revived. Where the original captor abandons his prize, whether voluntarily or through terror, and it is then recaptured, it is restored on payment of salvage, for the original owner never had the *animus delinquendi*. As to recaptors, although their right of salvage is extinguished by a subsequent hostile recapture, and regular sentence of condemnation, divesting the original owners of their property, yet if the vessel be restored upon such recapture, and resume her voyage, either in consequence of judicial acquittal, or a release by the sovereign power, the recaptors are reintegrated in their right of salvage. And recaptors and salvors have a legal interest in the property, which cannot be divested by other subjects, without an adjudication in a competent court; and it is not for the government's ships or officers, or for other persons, on the ground of superior authority, to dispossess them without cause. In all cases of salvage where the rate is not ascertained by positive law, it is in the discretion of the court, as well upon recaptures as in other cases.[1]

[1] Wheaton, *Elem. Int. Law*, pt. iv. ch. ii. § 12; the 'Wight,' 6 *Rob.*, 315; the 'Belle,' 1 *Edwards R.*, 66; the 'Franklin,' 4 *Rob.*, 147; the 'Edward and Mary,' 3 *Rob.*, 305; the 'Pensamiento Feliz,' 1 *Edw. R.*, 116; the 'Astrea,' 1 *Wheat. R.*, 125; the 'Lord Nelson, 1 *Edw. R.*, 79; the 'Diligentia,' 1 *Dod. R.*, 404; the 'Mary,' 2 *Wheat R.*, 123; the 'John and Jane,' 4 *Rob.*, 216; the 'Gage,' 6 *Rob.*, 273; the 'Charlotte Caroline,' 1 *Dod. R.*, 192; the 'Blendenhall,' 1 *Dod. R.*, 414; the 'Apollo,' 3 *Rob. R.*, 308; Talbot *v.* Seaman, 1 *Cranch. R.*, 1; the 'Barbara,' 3 *Rob.*, 171; the 'Helen,' 3 *Rob.*, 224; the 'Polly,' 4 *Rob.*, 227, note; the 'Mary Ford,' 3 *Dallas R.*, 188; the 'Adventurer,' 8

If original capture be unlawful

§ 23. If the original capture was unlawful, the recaptor, says Emerigon, acquires no property in the recapture. Thus, the French bark 'Victoire,' chased by an English privateer, took refuge under the castle of the island of Majorca, and was taken by the privateer while at anchor within pistol shot of the castle. Some days after the bark was recaptured by another French vessel. The original capture was held to have been unlawful and void, for having been made in neutral territory, and, consequently, in violation of the law of nations. The recaptor, however, received a large salvage for the recapture, probably as a fair compensation for his trouble, time, danger, and expense in the rescue. This principle is applied to the recapture of neutral property—that is, of property neutral to both of the belligerents. If the original capture was a violation of the law of nations, the recaptors from the possession of the enemy acquire no right of property whatsoever. This is the universally received doctrine of the law of nations. 'A belligerent,' says Story, 'by recapturing neutral property (neutral to all the belligerents) has done no meritorious service, and is not entitled even to any salvage Nay, the recaptors may be held responsible in damages for the act, unless there was a real danger of condemnation to the neutral by the original captors, from their lawless disregard of the law of nations; and if there was such danger, then the recaptors are entitled to salvage only.'[1]

In case of ransom

§ 24. Emerigon discusses at considerable length the effect of a recapture of the ransom bill and hostage. Is the recaptor entitled to retain the hostage, and to demand the price of the ransom? A privateer out of Guernsey, which had ransomed a French bark coming from Bayonne, was afterwards taken, with the hostage and ransom bill on board, by the French corvette 'Amaranthe.' The admiral declared the prize good, and decreed the ransom to the king, who, by his ordinance, annulled the bill and discharged the owners of the bark from

Cranch. R., 327; 1 *Wheat. R.*, 128, note; Hudson *v.* Guestier, 4 *Cranch. R.*, 293; 6 *Cranch. R.*, 281; the 'Louisa,' 1 *Dod. R.*, 317; the 'Sedulous,' 1 *Dod. R.*, 253.

[1] Emerigon, *Traité des Assurances*, ch. xii. § 23; Story, *Miscell. Writings*, p. 580 et seq.; Valin, *Com. sur l'Ordonnance*, art. viii. tit. 'Des Prises;' Merlin, *Répertoire*, verb. 'Prise Maritime,' § 3, art. iv.; Miller *v.* the 'Resolution,' 2 *Dallas R.*, 1; Talbot *v.* Seaman, 1 *Cranch. R.*, 1; the 'War Ouskan,' 2 *Rob.*, 299; Bello, *Derecho Internacional*, pt. ii. cap. v. § 7.

the payment of the ransom. Valin maintains that the ransom bill and hostage represent, each separately and *in solido*, the ransomed vessel; so that the recapture of the privateer with one or the other on board suffices to deprive her of all claim and title under the ransom bill, and transfers her rights to a new owner. But, if the privateer has remitted the bill to her owner, and at the same time sent the hostage on shore, the owner will then be entitled to payment of the ransom money, although the privateer should be afterwards taken. Emerigon quotes Olea to prove, that the ransomed bill is neither the vessel ransomed nor the ransom itself—that, although *proof* of the obligation, it is not the obligation itself. With respect to the hostage, he cannot become a prisoner of war to his own countrymen. He, therefore, is of opinion that the ransom bill captured in this case is valueless, and that the hostage recovers his liberty. The rights of the enemies' privateer have vanished with his defeat; and the French privateer has no claim beyond the actual booty he has made. But if the ransom bill was accompanied by a bill of exchange drawn by the captain of the ransomed vessel, and this bill has been negotiated in good faith to the order of a third party *for value received*, it is to be paid by the owners of the ransomed vessel, notwithstanding the liberation of the hostage found on board of the captured privateer.[1]

A vessel recaptured by her master and crew

§ 25. The same author discusses the question of recapture of a vessel by her own crew. He says that those who throw off the yoke of an enemy, simply re-enter into all their rights, and recover their first condition. That, it being the duty of the captain and crew of a captured vessel to retake her, when possible, they cannot claim her by the right of recovery when so retaken. By throwing off the yoke of the captor, they have merely rendered themselves masters of their own vessel, and re-entered upon their former rights, but have acquired no new rights of property in the recovered vessel or cargo. But, in a case decided in the British Court of Admiralty, large salvage was decreed for such recapture. The circumstances, however, were somewhat peculiar, and perhaps formed an exception to the general rule. The vessel was American, a portion of the

[1] Emerigon, *Traité des Assurances*, ch. xii. § 23; Valin, *Traité des Prises*, ch. xi. §§ 2, 3; Dalloz, *Répertoire*, verb. 'Prises Maritimes,' § 3; De Cussy, *Droit Maritime*, liv. iii. tit. iii. §§ 29, 30.

crew were British seamen, working their passage home. They assisted in recapturing the vessel from the enemy, and were allowed salvage on the property brought into a British port, it being held that, under the circumstances, it was no part of their duty as seamen to attempt the recapture, and that they would not have been guilty of desertion if they had declined it. The act of recapture was, therefore, on their part, a voluntary act.[1]

Recapture from pirates

§ 26. Captures by pirates being unlawful, no title can properly rest either in the captors or their vendees, and, in case of recapture, the original owner is, on principle, entitled to complete restitution. The same rule applied to the Barbary States, when they were piratical.[2] On account of the risk incurred and benefit conferred, the courts have usually allowed a pretty large salvage to recaptors from pirates where such salvage is not regulated by municipal law. Some States have left this matter of salvage for rescue from pirates discretionary with the courts, while others have regulated it by law or ordinance. The French law of 2 Prairial, an XI, allowed to the recaptor a salvage of one-third the value of the ship and cargo. The Spanish ordinance put the possession by a pirate upon the same footing as by a privateer, the title to property being changed by twenty-four hours' possession; and, consequently, if recaptured after that period, no restitution could be claimed, but if before, restitution on payment of a salvage of one-third the value. Such was also the former usage of Holland and Venice, which was justified on the ground of public utility, as an inducement to attack pirates. The salvage for recapture from pirates in Great Britain is one-eighth the value of the captured property. In the United States salvage is demandable upon the recapture of property which has been seized by pirates. With respect to restitution and salvage in case of the recapture from pirates of the property of alien friends, the rule of reciprocity is usually followed. Hautefeuille objects to the allowance of salvage in such cases, or at least to so large a salvage as one-third of the value, and refers with approbation to the treaty of 1783, between the United

[1] Emerigon, *Traité des Assurances*, ch. xii. § 25; Sirey, *Recueil*, &c., an. xii. pt. ii. p. 5; the 'Two Friends,' 1 *Rob.*, 271; the 'Florence,' 16 *Jur.*, 572.

[2] The 'Helena,' 4 *Rob.*, 3.

States and Sweden, by which it was agreed that property retaken from pirates, by a ship of war or privateer, should be restored entire to the true proprietor.[1]

Recapture by land and sea forces

§ 27. The rules of joint capture, given in chapter xxxi., are equally applicable to joint recapture. It was held in England, that although the Prize Act only mentioned recaptures by ships and boats, it did not intend to exclude those made by the assistance of land forces. Where an island was taken by a joint naval and military force, the ships recaptured were held liable to be adjudged under that Act, and to be condemned to the captors, or to be restored on payment of salvage, as the case might be. Moreover, a land force may be entitled to sustain a claim of salvage for recapture of vessels in a maritime port, without the co-operation of a naval force, where the recapture is a necessary and immediate result of a military operation directed to the capture of the place within whose port the property is lying. Thus, where the delivery of captured English vessels resulted from the reoccupation of Oporto by the allied army under the Duke of Wellington, which was effected by military operations and a battle fought in the neighbourhood for that object, the army was held to be entitled to salvage. It was also held that this claim of salvage would attach upon property landed and warehoused by the enemy, where it remained to be reclaimed by the owners on the recapture of the place, and was resumed and returned on board as parts of the cargoes of the vessels so recaptured.[2]

By native and allied armies in native ports

§ 28. But a distinction is made where vessels of the same country are recaptured in native ports by a native army alone, or with the co-operation of allied forces. Thus, in the case of Oporto, it was held that although salvage was due for the recapture of English vessels in that port, none could be allowed for the Portuguese vessels recaptured at the same time. By the reoccupation of the port by the forces of the State, the

[1] 13 and 14 Vict., c. 26 (repealing 6 Geo. IV., c. 49); Talbot *v.* Seaman, 1 *Cranch.*, 28; Dawson *v.* Sealskins, 2 *Paine*, 324; Brown, *Civil and Admiralty Law*, vol. ii. ch. iii. p. 461; the 'Calypso,' 2 *Hagg. R.*, 213; Pothier, *Traité de Propriété*, No. 101; Hautefeuille, *Des Nations Neutres*, tit. xiii. ch. 3; Dalloz, *Répertoire*, verb. 'Prises Maritimes,' § 3; De Cussy, *Droit Maritime*, lib. i. tit. iii. § 30.

[2] The 'Ceylon,' 1 *Dod. R.*, 116; the 'Progress,' *Edw. R.*, 210; the 'Wanstead,' *Edw. R.*, 268; the 'Spankler,' 1 *Dod. R.*, 360; the 'Dorothy Foster,' 6 *Rob.*, 88.

rights of the former sovereign were restored, and his subjects were entitled to receive their property back as it stood before the irruption of the enemy. The whole would revert instantly to the former owners, on the well-established principle of postliminy. The history of the world has produced no instance in which a claim of salvage for the rescue of a capital city, by the native army, has been made and allowed, and, therefore, on principle and in practice, the claim is not sustainable. That is the state of the transaction in its simplest form. But, suppose allies to be co-operating with the native army in the recapture; in that case the army coming as allies, and associated with the native army, compose part of the same body; they are pursuing the same objects, and stand in every respect on the same footing; they would have the same rights and no more, and the proportion of force can make no difference. The whole together must be considered as one army in every respect, where native property is concerned; and if the native army would not be entitled to salvage, the armies of the allies can claim none.'[1]

[1] Heffter, *Droit International*, § 187 et seq.; Wildman, *Int. Law*, vol. ii. p. 288; the 'Progress,' *Edw. R.*, 219.

APPENDIX

GENERAL ACT OF THE BRUSSELS CONFERENCE RELATIVE TO THE AFRICAN SLAVE TRADE

Signed at Brussels, July 2, 1890, *on behalf of Great Britain, Germany, Austria-Hungary, Belgium, Denmark, Spain, the Congo, United States of America, France, Italy, Netherlands, Persia, Portugal, Russia, Sweden and Norway, Turkey, and Zanzibar, and came into force April* 2, 1892.

CHAPTER I

SLAVE TRADE COUNTRIES—MEASURES TO BE TAKEN IN PLACES OF ORIGIN

Article I

The Powers declare that the most effective means for counteracting the Slave Trade in the interior of Africa are the following :—

1. Progressive organisation of the administrative, judicial, religious, and military services in the African territories placed under the sovereignty or protectorate of civilised nations.

2. The gradual establishment in the interior, by the responsible Power in each territory, of strongly occupied stations, in such a way as to make their protective or repressive action effectively felt in the territories devastated by man-hunts.

3. The construction of roads, and in particular of railways, connecting the advanced stations with the coast, and permitting easy access to the inland waters, and to the upper reaches of streams and rivers which are broken by rapids and cataracts, so as to substitute economical and speedy means of transport for the present means of portage by men.

4. Establishment of steam-boats on the inland navigable waters and on the lakes, supported by fortified posts established on the banks.

5. Establishment of telegraphic lines assuring the communication of the posts and stations with the coast and with the administrative centres.

6. Organisation of expeditions and flying columns to keep up the communication of the stations with each other and with the coast, to support repressive action, and to assure the security of roadways.

7. Restriction of the importation of fire-arms, at least of modern pattern, and of ammunition, throughout the entire extent of the territories infected by the Slave Trade.

Article II

The stations, the cruisers organised by each Power in its inland waters, and the posts which serve as ports for them shall, independently of their principal task, which is to prevent the capture of slaves and intercept the routes of the Slave Trade, have the following subsidiary duties :—

1. To serve as a base and, if necessary, as a place of refuge for the native populations placed under the sovereignty or the protectorate of the State to which the station belongs, for the independent populations, and temporarily for all others in case of imminent danger ; to place the populations of the first of these categories in a position to co-operate for their own defence ; to diminish intestine wars between tribes by means of arbitration ; to initiate them in agricultural works and in the industrial arts, so as to increase their welfare ; to raise them to civilisation and bring about the extinction of barbarous customs, such as cannibalism and human sacrifices.

2. To give aid and protection to commercial undertakings ; to watch over their legality, especially by controlling contracts of service with natives ; and to lead up to the foundation of permanent centres of cultivation and of commercial establishments.

3. To protect, without distinction of creed, the Missions which are already or may hereafter be established.

4. To provide for the sanitary service, and to grant hospitality and help to explorers and to all who take part in Africa in the work of repressing the Slave Trade.

Article III

The Powers exercising sovereignty or protectorate in Africa, in order to confirm and give greater precision to their former declarations, undertake to proceed gradually, as circumstances permit, either by the means above indicated, or by any other means which they may consider suitable, with the repression of the Slave Trade ; each State in its respective possessions and under its own direction. Whenever they consider it possible they will lend their good offices

to the Powers which, with a purely humanitarian object, may be engaged in Africa upon a similar mission.

Article IV

The Powers exercising sovereignty or protectorate in Africa may, however, delegate to Chartered Companies all or a portion of the engagements which they assume in virtue of Article III. They remain, nevertheless, directly responsible for the engagements which they contract by the present General Act, and guarantee the execution thereof. The Powers promise to receive, aid, and protect national Associations and enterprises due to private initiative which may wish to co-operate in their possessions in the repression of the Slave Trade, subject to their receiving previous authorisation, which is revocable at any time; subject also to their being directed and controlled, and to the exclusion of any exercise of rights of sovereignty.

Article V

The contracting Powers undertake, unless this has already been provided for by laws in accordance with the spirit of the present Article, to enact or propose to their respective Legislatures, in the course of one year at latest from the date of the signature of the present General Act, a Law applying, on the one hand, the provisions of their penal laws concerning grave offences against the person, to the organisers and abettors of man-hunts, to perpetrators of the mutilation of adults and male infants, and to all persons who may take part in the capture of slaves by violence; and, on the other hand, the provisions relating to offences against individual liberty, to carriers, transporters, and dealers in slaves. Accomplices and accessories of the different categories of slave captors and dealers above specified, shall be punished with penalties proportionate to those incurred by the principals. Guilty persons who may have escaped from the jurisdiction of the authorities of the country where the crimes or offences have been committed, shall be arrested either on communication of the incriminatory evidence by the authorities who have ascertained the violation of the law, or on production of any other proof of guilt by the Power on whose territory they may have been discovered, and shall, without other formality, be held at the disposal of the Tribunals competent to try them.

The Powers will communicate to each other with the least possible delay the Laws or Decrees already in existence or promulgated in execution of the present Article.

Article VI

Slaves liberated in consequence of the stoppage or dispersal of a convoy in the interior of the continent, shall be sent back, if circum-

stances permit, to their country of origin ; if not, the local authorities shall help them as much as possible to obtain means of subsistence, and, if they desire it, to settle on the spot.

Article VII

Any fugitive slave claiming on the continent the protection of the signatory Powers shall obtain it, and shall be received in the camps and stations officially established by them, or on board Government vessels plying on the lakes and rivers. Private stations and vessels are only permitted to exercise the right of asylum subject to the previous sanction of the State.

Article VIII

The experience of all nations who have intercourse with Africa having shown the pernicious and preponderating part played by fire-arms in slave-trade operations, as well as in intestine wars between native tribes ; and this same experience having clearly proved that the preservation of the African populations, whose existence it is the express wish of the Powers to safeguard, is a radical impossibility if restrictive measures against the trade in fire-arms and ammunition are not established ; the Powers decide, in so far as the present state of their frontiers permits, that the importation of fire-arms, and especially of rifles and improved weapons, as well as of powder, balls, and cartridges, is, except in the cases and under the conditions provided for in the following Article, prohibited in the territories comprised between the 20th parallel of north latitude and the 22nd parallel of south latitude, and extending westward to the Atlantic Ocean, and eastward to the Indian Ocean and its dependencies, comprising the islands adjacent to the coast as far as 100 nautical miles from the shore.

Article IX

The introduction of fire-arms and ammunition, when there shall be occasion to authorise it in the possessions of the signatory Powers which exercise rights of sovereignty or of protectorate in Africa, shall be regulated in the following manner in the zone laid down in Article VIII., unless identical or more rigorous regulations have been already applied :—

All imported fire-arms shall be deposited, at the cost, risk, and peril of the importers, in a public warehouse placed under the control of the Administration of the State. No withdrawal of fire-arms or imported ammunition shall take place from such warehouses without the previous authorisation of the Administration. This authorisation shall, except in cases hereinafter specified, be refused for the withdrawal of all arms of precision, such as rifles, magazine guns, or

breech-loaders, whether whole or in detached pieces, their cartridges, caps, or other ammunition intended for them.

At the sea ports the respective Governments may permit the establishment of private warehouses, under conditions affording the needful guarantees ; but only for ordinary powder and flint-lock guns, and to the exclusion of improved arms and their ammunition.

Besides the measures directly taken by Governments for the arming of the public force and the organisation of their defence, individual exceptions shall be admitted for persons affording sufficient guarantees that the arm and ammunition delivered to them will not be given, assigned, or sold to third persons, and for travellers provided with a declaration of their Government stating that the weapon and ammunition are destined exclusively for their personal defence. In the cases provided for in the preceding paragraph, all arms shall be registered and marked by the authorities appointed for the control, who shall deliver to the persons in question licenses to bear arms, indicating the name of the bearer and showing the stamp with which the arm is marked. These licenses are revocable in case of proved abuse, and will be issued for five years only, but may be renewed. The rule above set forth as to warehousing shall also apply to gunpowder. Only flint-lock, unrifled guns and common gunpowder, called trade powder ('poudres de traite'), can be withdrawn from the warehouses for purposes of sale. At each withdrawal of arms and ammunition of this kind for sale, the local authorities shall determine the regions in which these arms and ammunition may be sold. The regions infected by the Slave Trade shall always be excluded. Persons authorised to take arms or powder out of the warehouses shall present to the Administration every six months detailed lists indicating the destinations of the said fire-arms and powder sold, as well as the quantities still remaining in store.

Article X

The Governments shall take all measures they may deem necessary to ensure as complete a fulfilment as possible of the provisions respecting the importation, sale, and transport of fire-arms and ammunition, as well as to prevent either the entry or exit thereof by their inland frontiers, or the conveyance thereof to regions where the Slave Trade exists.

The authorisation of transit within the limits of the zone specified by Article VIII. cannot be withheld when the arms and ammunition are to pass across the territory of a signatory or adherent Power in the occupation of the coast, towards inland territories placed under the sovereignty or protectorate of another signatory or adherent Power, unless this latter Power have direct access to the sea through its own territory. Nor, if this access be completely interrupted, can

the authorisation of transit be withheld. Any demand for transit must be accompanied by a declaration emanating from the Government of the Power having the inland possessions, and certifying that the said arms and ammunition are not destined for sale, but are for the use of the authorities of such Power, or of the military forces necessary for the protection of the missionary or commercial stations, or of persons mentioned by name in the declaration. Nevertheless, the territorial Power of the coast retains the right to stop, exceptionally and provisionally, the transit of arms of precision and ammunition across its territory, if, in consequence of inland disturbances or other serious danger, there is ground for fearing that the despatch of arms and ammunition might compromise its own safety.

Article XI

The Powers shall communicate to each other information relating to traffic in fire-arms and ammunition, the licenses granted, and the measures of repression in force in their respective territories.

Article XII

The Powers undertake to adopt or to propose to their respective Legislatures the measures necessary to ensure that those who infringe the prohibitions laid down in Articles VIII. and IX., and their accomplices, shall, besides the seizure and confiscation of the prohibited arms and ammunition, be punished either by fine or by imprisonment, or by both penalties together, in proportion to the importance of the offence, and in accordance with the gravity of each case.

Article XIII

The signatory Powers who have possessions in Africa in contact with the zone specified in Article VIII. bind themselves to take the necessary measures for preventing the introduction of fire-arms and ammunition across their inland frontiers into the regions of the said zone, at least that of improved arms and cartridges.

Article XIV

The system established under Articles VIII. to XIII. inclusive shall remain in force for twelve years. In case none of the contracting parties shall have notified, twelve months before the expiration of this period, their intention of putting an end to it, nor shall have demanded its revision, it shall continue to remain obligatory for two more years, and shall thus continue in force from two years to two years.

CHAPTER II

CARAVAN ROUTES AND LAND TRANSPORT OF SLAVES

Article XV

Independently of the repressive or protective action which they exercise in the centres of the Slave Trade, the stations, cruisers, and posts the establishment of which is provided for in Article II., and all other stations established or recognised according to the terms of Article IV. by each Government in its possessions, will furthermore have the mission of watching, so far as circumstances permit, and in proportion to the progress of their administrative organisation, the routes on their territory followed by the slave-dealers, of stopping the convoys on the march, and of pursuing them wherever they can legally take action.

Article XVI

In the regions of the coast known to serve habitually as places of passage or terminal points for Slave Traffic coming from the interior, as well as at the points of intersection of the principal caravan routes crossing the zone contiguous to the coast already subject to the influence of the Sovereign or Protecting Powers, posts shall be established, under the conditions and with the reservations mentioned in Article III., by the authorities responsible for such territories, with the purpose of intercepting the convoys and liberating the slaves.

Article XVII

A strict supervision shall be organised by the local authorities at the ports and in the countries adjacent to the coast, with the view of preventing the sale and shipment of slaves brought from the interior, as well as the formation and departure for the interior of bands of man-hunters and slave-dealers.

Caravans arriving at the coast or its vicinity, as well as those arriving in the interior at a locality occupied by the authorities of the territorial Power, shall, on arrival, be submitted to a minute inspection as to the persons composing them. Any individual ascertained to have been captured or carried off by force or mutilated, either in his native country or on the way, shall be liberated.

Article XVIII

In the possessions of each of the contracting Powers the Administration shall have the duty of protecting liberated slaves, of repatriat-

ing them if possible, of procuring for them means of subsistence, and in particular of providing for the education and support of abandoned children.

Article XIX

The penal arrangements provided for in Article V. shall be made applicable to all crimes or offences committed in the course of operations for the transport of and Traffic in Slaves on land, whenever proved. Any person having incurred a penalty in consequence of an offence provided for by the present General Act, shall be under the obligation of providing security before he is allowed to undertake any commercial operation in countries where the Slave Trade is carried on.

CHAPTER III

REPRESSION OF THE SLAVE TRADE BY SEA

§ I. General Provisions

Article XX

The signatory Powers acknowledge the opportuneness of taking steps in common for the more effective repression of the Slave Trade in the maritime zone in which it still exists.

Article XXI

This zone extends, on the one hand, between the coasts of the Indian Ocean (those of the Persian Gulf and of the Red Sea included) from Beloochistan to Point Tangalane (Quilimane), and, on the other hand, a conventional line which first follows the meridian of Tangalane till it meets the 26th degree of south latitude ; is then merged in this parallel, then passes round the Island of Madagascar by the east, keeping 20 miles off the east and north shore, till it crosses the meridian of Cape Amber. From this point the limit of the zone is determined by an oblique line which extends to the coast of Beloochistan, passing 20 miles off Cape Ras-el-Had.

Article XXII

The signatory Powers of the present General Act, between whom there are special Conventions for the suppression of the Slave Trade, have agreed to restrict to the above-mentioned zone the clauses of these Conventions concerning the reciprocal right of visit, search, and detention ('droit de visite, de recherche, et de saisie') of vessels at sea.

Article XXIII

The same Powers have also agreed to limit the above-mentioned right to vessels of less than 500 tons burthen. This stipulation shall be revised as soon as experience shall have shown the necessity of such revision.

Article XXIV

All other provisions of the Conventions concluded between the aforesaid Powers, for the suppression of the Slave Trade, remain in force in so far as they are not modified by the present General Act.

Article XXV

The signatory Powers undertake to adopt effective measures for preventing the usurpation of their flag, and putting a stop to the transport of slaves on vessels authorised to fly their colours.

Article XXVI

The signatory Powers undertake to adopt all measures necessary for facilitating the rapid exchange of information calculated to bring about the discovery of persons taking part in Slave Trade operations.

Article XXVII

At least one International Bureau shall be created ; it shall be established at Zanzibar. The High Contracting Parties undertake to forward to it all the documents specified in Article XLI., as well as information of all kinds likely to assist in the suppression of the Slave Trade.

Article XXVIII

Any slave who may have taken refuge on board a ship of war flying the flag of one of the signatory Powers, shall be immediately and definitively freed ; such freedom, however, shall not withdraw him from the competent jurisdiction, if he has committed a crime or offence at common law.

Article XXIX

Every slave detained against his wish on board a native vessel, shall have the right to claim his liberty.

His freedom may be declared by any Agent of one of the signatory Powers on whom the General Act confers the right of ascertaining the status of persons on board such vessels ; such freedom, however, shall not withdraw him from the competent jurisdiction if he has committed a crime or offence at common law.

§ II. Regulation concerning the Use of the Flag and Supervision by Cruisers

I. Rules respecting the grant of the flag to native vessels, and respecting crew lists and manifests of black passengers

Article XXX[1]

The signatory Powers undertake to exercise a strict supervision over the native vessels authorised to fly their flag in the zone indicated in Article XXI., and over the commercial operations carried on by such vessels.

Article XXXI

The term 'native vessel' applies to vessels fulfilling one of the two following conditions :—

1. It must present the outward appearance of native build or rig.

2. It must be manned by a crew of whom the captain and the majority of the seamen belong by origin to a country having a sea-coast on the Indian Ocean, the Red Sea, or the Persian Gulf.

Article XXXII

Authority to fly the flag of one of the said Powers shall in future only be granted to such native vessels as shall satisfy all the three following conditions :—

1. Their fitters-out or owners must be either subjects of or persons protected by the Power whose flag they claim to fly.

2. They must furnish proof that they possess real estate situated in the district of the authority to whom their application is addressed, or to supply a solvent security as a guarantee for any fines to which they may eventually become liable.

3. Such fitters-out or owners, as well as the captain of the vessel, must furnish proof that they enjoy a good reputation, and especially that they have never been condemned for acts of Slave Trade.

Article XXXIII

The authorisation, when granted, shall be renewed every year. It can at any time be suspended or withdrawn by the authorities of the Power whose colours the vessel flies.

Article XXXIV

The deed of authorisation shall bear the indications necessary to establish the identity of the vessel. The captain shall have the

[1] By letter of December 31, 1891, France promises to apply Articles XXX. to XLI. to Obock, and according to necessity to the island of Madagascar and the Comoros.

custody of it. The name of the native vessel and the indication of its tonnage shall be inlaid and painted in Latin characters on the stern; and the initial or initials of the name of the port of registry, as well as the registration number in the series of numbers of that port, shall be printed in black on the sails.

Article XXXV

A crew list shall be issued to the captain of the vessel at the port of departure by the authorities of the Power whose colours it flies. It shall be renewed each time the vessel is fitted out, or, at latest, at the end of a year, and in conformity with the following provisions :—

1. The list shall be *visé* at the moment of departure by the authority who has issued it.

2. No negro can be engaged as a seaman on a vessel, without having been previously questioned by the authority of the Power whose colours it flies, or, failing such authority, by the territorial authority, with a view to establish that he has contracted a free engagement.

3. Such authority shall see that the proportion of seamen and boys is not out of proportion to the tonnage or rig of the vessels.

4. The authority who shall have interrogated the men before their departure, shall inscribe them on the crew list, in which they shall be mentioned with a short description of each of them against his name.

5. In order the more effectively to prevent any substitution, the seamen may, moreover, be provided with a distinctive mark.

Article XXXVI

If the captain of a vessel should desire to embark negro passengers, he shall make declaration thereof to the authority of the Power whose colours he flies, or, failing such authority, to the territorial authority. The passengers shall be interrogated, and after it has been ascertained that they embark of their own free will, they shall be inscribed in a special manifest, bearing the description of each of them against the name, and indicating especially sex and height. Negro children shall not be admitted as passengers unless they are accompanied by their relations, or by persons whose respectability is well known. On departure the passenger manifest shall be *visé* by the aforesaid authority after it has been called over. If there are no passengers on board, this shall be specially mentioned on the crew list.

Article XXXVII

On arrival at any port of call or destination, the captain of the vessel shall show to the authority of the Power whose flag he flies,

or, failing such authority, to the territorial authority, the crew list, and, if need be, the passenger manifests previously delivered. Such authority shall check the passengers arrived at their destination or stopping at a port of call, and shall mention their landing in the manifest. On departure the said authority shall affix a fresh *visa* to the list and to the manifest, and shall call over the passengers.

Article XXXVIII

On the African coast and on the adjacent islands no negro passenger shall be shipped on board a native vessel, except in localities where there is a resident authority belonging to one of the signatory Powers.

Throughout the zone mentioned in Article XXI. no negro passenger shall be landed from a native vessel, except at a place in which there is a resident authority belonging to one of the High Contracting Powers, and unless such authority is present at the landing.

Cases of *force majeure* which may have caused an infraction of these provisions shall be examined by the authority of the Power whose colours the vessel flies, or, failing such authority, by the territorial authority of the port at which the inculpated vessel puts in.

Article XXXIX

The provisions of Articles XXXV., XXXVI., XXXVII., and XXXVIII. are not applicable to vessels only partially decked, having a maximum crew of ten men, and satisfying one of the two following conditions :—

1. That it is exclusively employed in fishing within territorial waters.

2. That it is occupied in the small coasting trade between different ports of the same territorial Power, and never goes further than five miles from the coast.

These different boats shall receive, according to circumstances, from the territorial or consular authority, a special license, renewable every year, and revocable under the conditions provided for in Article XL., and the uniform model of which, annexed to the present General Act, shall be communicated to the International Information Office.

Article XL

All acts or attempted acts of Slave Trade legally brought home to the captain, fitter-out, or owner of a vessel authorised to fly the flag of one of the signatory Powers, or holding the license provided for in Article XXXIX., shall entail the immediate withdrawal of the said authorisation or license. All offences against the provisions of

section 2 of Chapter III. shall in addition be punished by the penalties enacted by special laws and ordinances of each of the contracting Powers.

Article XLI

The signatory Powers undertake to deposit at the International Information Office specimen forms of the following documents :—

1. License to fly the flag.
2. Crew list.
3. Manifest of negro passengers.

These documents, the tenor of which may vary according to the different regulations of each country, shall compulsorily contain the following particulars, drawn up in a European language :—

1. As regards the authorisation to fly the flag—

(*a*) The name, tonnage, rig, and principal dimensions of the vessel.

(*b*) The register number and the signal letter of the port of registry.

(*c*) The date of obtaining the license, and the office held by the person who has issued it.

2. As regards the crew list—

(*a*) The name of the vessel, of the captain, and of the fitter-out or owner.

(*b*) The tonnage of the vessel.

(*c*) The register number and the port of registry of the vessel, its destination, and the particulars specified in Article XXV.

3. As regards the manifest of negro passengers—

The name of the vessel which conveys them, and the particulars indicated in Article XXXVI. for the proper identification of the passengers. The signatory Powers shall take the necessary measures in order that the territorial authorities or their consuls may send to the said Office certified copies of all authorisations to fly their flag, as soon as such authorisations shall have been granted, as well as notice of the withdrawal of any such authorisation.

The provisions of the present Article only concern the papers intended for native vessels.

2. DETENTION OF SUSPECTED VESSELS

Article XLII

When the officers in command of vessels of war of any of the signatory Powers have reason to believe that a vessel of less than 500 tons burthen, found in the above-mentioned zone, is engaged in the Slave Trade, or is guilty of the fraudulent use of a flag, they may proceed to the verification of the ship's papers. The present Article does not imply any change in the present state of things as regards jurisdiction in territorial waters.

Article XLIII

With this object, a boat, commanded by a naval officer in uniform, may be sent on board the suspected vessel after it has been hailed to give notice of such intention. The officer sent on board the vessel detained shall act with all possible consideration and moderation.

Article XLIV

The verification of the ship's papers shall consist in the examination of the following documents :

1. As regards native vessels, the papers mentioned in Article XLI.

2. As regards other vessels, the documents required by the different Treaties or Conventions remaining in force.

The verification of the ship's papers only authorises the muster of the crew and passengers in the cases and under the conditions provided for in the following Article.

Article XLV

Investigation of the cargo or search can only take place with respect to a vessel navigating under the flag of one of the Powers which have concluded, or may conclude, special conventions, as mentioned in Article XXII., and in accordance with the provisions of such conventions.

Article XLVI

Before quitting the detained vessel, the officer shall draw up a minute according to the forms and in the language of the country to which he belongs. This minute shall be dated and signed by the officer, and shall relate the facts. The captain of the detained vessel, as well as the witnesses, shall have the right to cause to be added to the minute any explanations they may think expedient.

Article XLVII

The commander of a man-of-war who may have detailed a vessel under a foreign flag shall in all cases make a report thereon to his own Government, and state the grounds upon which he acted

Article XLVIII

A summary of this report, as well as a copy of the minute drawn up by the officer sent on board the detained vessel, shall be sent as soon as possible to the International Information Office, which shall communicate the same to the nearest consular or territorial authority of the Power whose flag was used by the vessel in question. Duplicates of these documents shall be kept in the archives of the office.

Article XLIX

If, in carrying out the supervision provided for in the preceding Articles, the officer in command of the cruiser is convinced that an act of Slave Trade has been committed on board during the passage, or that irrefutable proofs exist against the captain, or fitter-out, to justify a charge of fraudulent use of the flag, of fraud, or of participation in the Slave Trade, he shall take the detained vessel to the nearest port of the zone where there is a competent authority of the Power whose flag has been used. Each signatory Power undertakes to appoint in the zone territorial or consular authorities, or special delegates competent to act in the above-mentioned cases; and to notify such appointments to the International Information Office. The suspected vessel can also be handed over to a cruiser of its own nation, if the latter consents to take charge of it.

3 EXAMINATION AND TRIAL OF VESSELS SEIZED

Article L

The authority referred to in the preceding Article, to whom the detained vessel has been handed over, shall proceed to make a full investigation, according to the laws and rules of his country, in the presence of an officer belonging to the foreign cruiser.

Article LI

If it is proved by the enquiry that the flag has been fraudulently used, the detained vessel shall remain at the disposal of its captor.

Article LII

If the examination shows an act of Slave Trade, made clear by the presence on board of slaves destined for sale, or by any other Slave Trade offence provided for by special convention, the vessel and cargo shall remain sequestrated in charge of the authority who has directed the enquiry. The captain and crew shall be handed over to the tribunals fixed by Articles LIV. and LVI. The slaves shall be set at liberty as soon as judgment has been delivered. In the cases provided for by this Article, liberated slaves shall be disposed of in accordance with the special conventions concluded or which may be concluded between the signatory Powers. In default of such conventions, the said slaves may be handed over to the local authority, to be sent back, if possible, to their country of origin; if not, such authority shall help them so far as possible to obtain means of subsistence, and, if they desire it, to settle on the spot.

Article LIII

If it should be proved by the enquiry that the vessel has been illegally detained, a right will accrue to an indemnity in proportion to the damages suffered by the vessel being taken out of its course. The amount of this indemnity shall be fixed by the authority which has directed the enquiry.

Article LIV

In case the officer of the capturing vessel should not accept the conclusions of the enquiry carried on in his presence, the matter shall, as a matter of course, be handed over to the tribunal of the nation under whose flag the captured vessel sailed. No exception shall be made to this rule, unless the disagreement arises in respect of the amount of the indemnity provided for in Article LIII., when it shall be fixed by arbitration, as specified in the following Article.

Article LV

The capturing officer, and the authority which has directed the enquiry, shall each appoint an Arbitrator within forty-eight hours; and the two Arbitrators shall have twenty-four hours to choose an Umpire. The Arbitrators shall, as far as possible, be chosen from among the Diplomatic, Consular, or Judicial officers of the signatory Powers. Natives in the pay of the contracting Governments are formally excluded. The decision shall be taken by majority of votes, and shall be considered final. If the Court of Arbitration is not constituted within the time indicated, the procedure in respect of indemnity and damages shall be in accordance with the provisions of Article LVIII., paragraph 2.

Article LVI

Cases shall be referred with the least possible delay to the tribunal of the nation whose colours have been used by the accused. Nevertheless, Consuls or any other authority of the same nation as the accused, specially commissioned to that effect, may be authorised by their Government to deliver judgment instead and in the place of the tribunals.

Article LVII

The procedure and judgment in regard to offences against the provisions of Chapter III. shall always take place in as summary a manner as is permitted by the laws and regulations in force in the territories subject to the authority of the signatory Powers.

Article LVIII

Any judgment of the national tribunal, or of the authorities referred to in Article LVI., declaring that the detained vessel did not

carry on Slave Trade, shall be immediately executed, and the vessel shall be entirely free to continue its course. In such case the captain or fitter-out of a vessel detained without legitimate ground of suspicion, or which has been subjected to annoyance, shall have the right of claiming damages, the amount of which shall be fixed by agreement between the Governments directly interested, or by arbitration, and shall be paid within a period of six months from the date of the judgment acquitting the captured vessel.

Article LIX

In case of condemnation, the sequestered vessel shall be declared a lawful prize for the benefit of the captor. The captain, crew, and all other persons found guilty shall be punished according to the gravity of the crimes or offences committed by them, and in accordance with Article V.

Article LX

The provisions of Articles L. to LIX. do not affect in any way the jurisdiction or procedure of existing special tribunals, or of those which may hereafter be formed to take cognisance of Slave Trade offences.

Article LXI

The High Contracting Parties undertake to make known to each other reciprocally the instructions which they may give to the commanders of their men-of-war navigating the seas of the zone referred to for carrying out the provisions of Chapter III.

CHAPTER IV

COUNTRIES TO WHICH SLAVES ARE SENT, THE INSTITUTIONS OF WHICH RECOGNISE THE EXISTENCE OF DOMESTIC SLAVERY

Article LXII

The contracting Powers whose institutions recognise the existence of domestic slavery, and whose possessions, whether in or out of Africa, consequently serve, in spite of the vigilance of the authorities, as places of destination for African slaves, engage to prohibit the importation, transit, and exit, as well as traffic in Slaves. They shall organise the most active and the strictest supervision at all places where the arrival, transit, or exit of African slaves takes place.

Article LXIII

Slaves liberated under the provisions of the preceding Article shall, if circumstances permit, be sent back to the country from

whence they came. In all cases they shall receive letters of freedom from the competent authorities, and shall be entitled to their protection and assistance for the purpose of obtaining means of subsistence.

Article LXIV

Every fugitive slave arriving at the frontier of any of the Powers mentioned in Article LXII. shall be considered free, and shall have the right to claim letters of freedom from the competent authorities.

Article LXV

Any sale or transaction to which the slaves referred to in Articles LXIII. and LXIV. may have been subjected through circumstances of any kind whatsoever shall be considered as null and void.

Article LXVI

Native vessels flying the flag of one of the countries mentioned in Article LXII., if there is any indication that they are employed in Slave Trade operations, shall be subjected by the local authorities in the ports they frequent to a strict verification of their crew and passengers, both on arrival and departure. Should African slaves be on board, judicial proceedings shall be taken against the vessel and against all persons who may be implicated. Slaves found on board shall receive letters of freedom through the authorities who effected the seizure of the vessels.

Article LXVII

Penal provisions in harmony with those provided for by Article V. shall be issued against persons importing, transporting, and trading in African slaves, against the mutilators of children or of male adults, and those who traffic in them, as well as against their associates and accomplices.

Article LXVIII

The signatory Powers recognise the great importance of the law respecting the prohibition of the Negro Slave Trade sanctioned by his Majesty the Emperor of the Ottomans on the 4th (16th) of December, 1889 (22 Rebi-ul-Akhir, 1307), and they are assured that an active supervision will be organised by the Ottoman authorities, especially on the west coast of Arabia and on the routes which place this coast in communication with the other possessions of his Imperial Majesty in Asia.

Article LXIX

His Majesty the Shah of Persia consents to organise an active supervision in the territorial waters, and on those portions of the coast of the Persian Gulf and Gulf of Oman which are under his sovereignty, and over the inland routes which serve for the transport

of slaves. The magistrates and other authorities shall receive the necessary powers for this purpose.

Article LXX

His Highness the Sultan of Zanzibar consents to give his most effective support for the repression of crimes and offences committed by traders in African slaves on land as well as at sea. The tribunals created for this purpose in the sultanate of Zanzibar shall strictly apply the penal provisions mentioned in Article V. In order the better to ensure the freedom of liberated slaves, both in virtue of the provisions of the present General Act and of the decrees issued in this matter by his Highness and his predecessors, a Liberation Office shall be established at Zanzibar.

Article LXXI

Diplomatic and Consular Agents and naval officers of the contracting Powers shall, within the limits of existing conventions, give their assistance to the local authorities in order to assist in repressing the Slave Trade where it still exists. They shall be entitled to be present at trials for slave-trading brought about at their instance, without, however, being entitled to take part in the deliberations.

Article LXXII

Liberation Offices, or institutions in lieu thereof, shall be organised by the Administrations of the countries to which African slaves are sent, for the purposes specified in Article XVIII.

Article LXXIII

The signatory Powers having undertaken to communicate to each other all information useful for the repression of the Slave Trade, the Governments whom the present chapter concerns shall periodically exchange with the other Governments statistical data relating to slaves detained and liberated, as well as the legislative and administrative measures taken for suppressing the Slave Trade.

CHAPTER V

INSTITUTIONS INTENDED TO ENSURE THE EXECUTION OF THE GENERAL ACT

§ I. The International Maritime Office

Article LXXIV

In accordance with the provisions of Article XXVII., an International Office is instituted at Zanzibar, in which each of the signatory Powers may be represented by a Delegate.

Article LXXV

The Office shall be constituted as soon as three Powers have appointed their representatives.

It shall draw up regulations fixing the mode of exercising its functions. These regulations shall immediately be submitted for the approval of those signatory Powers who shall have notified their intention of being represented in the Office, and who shall come to a decision with regard to them with the least possible delay.

Article LXXVI

The expenses of this institution shall be divided in equal parts among the signatory Powers mentioned in the preceding Article.

Article LXXVII

The object of the Office at Zanzibar shall be to centralise all documents and information of a nature to facilitate the repression of the Slave Trade in the maritime zone. For this purpose the signatory Powers undertake to forward to it within the shortest possible time—

1. The documents specified in Article XLI.

2. Summaries of the reports and copies of the minutes referred to in Article XLVIII.

3. The list of territorial or Consular authorities and Special Delegates competent to take action as regards detained vessels, according to the terms of Article XLIX.

4. Copies of judgments and decrees of condemnation delivered in accordance with Article LVIII.

5. All information likely to lead to the discovery of persons engaged in the Slave Trade in the above-mentioned zone.

Article LXXVIII

The archives of the Office shall always be open to naval officers of the signatory Powers authorised to act within the limits of the zone defined in Article XXI., as well as to the territorial or judicial authorities, and to Consuls specially appointed by their Governments.

The Office shall supply to foreign officers and agents authorised to consult its archives translations in a European language of documents written in an Oriental language. It shall make the communications provided for in Article XLVIII.

Article LXXIX

Auxiliary Offices in communication with the Office at Zanzibar may be established in certain parts of the zone, on agreement before-

hand between the interested Powers. They shall be composed of Delegates of such Powers, and established in conformity with Articles LXXV., LXXVI., and LXXVIII. The documents and information specified in Article LXXVII., so far as they relate to the part of the zone specially concerned, shall be sent to them direct by the territorial and consular authorities of the region in question, without prejudice to the communication to the Zanzibar Office provided for by the same Article.

Article LXXX

The Office at Zanzibar shall draw up, within the two first months of every year, a Report upon its own operations, and those of the auxiliary offices, during the past year.

§ II. EXCHANGE BETWEEN THE RESPECTIVE GOVERNMENTS OF DOCUMENTS AND INFORMATION RELATING TO THE SLAVE TRADE

Article LXXXI

The Powers shall communicate to each other to the fullest extent, and with the least delay which they shall consider possible—

1. The texts of the laws and administrative regulations, whether already existing or enacted in application of the clauses of the present General Act.

2. Statistical information concerning the Slave Trade, slaves detained and liberated, and the traffic in arms, ammunition, and spirituous liquors.

Article LXXXII

The exchange of these documents and information shall be centralised in a special office attached to the Foreign Office in Brussels.

Article LXXXIII

The Office at Zanzibar shall forward to it every year the Report mentioned in Article LXXX. upon its operations during the past year, and upon those of the auxiliary offices which may have been established in accordance with Article LXXIX.

Article LXXXIV

The documents and information shall be collected and published periodically, and addressed to all the signatory Powers. This publication shall be accompanied every year by an analytical Table of the legislative, administrative, and statistical documents mentioned in Articles LXXXI. and LXXXIII.

Article LXXXV

The office expenses and the expenditure incurred for correspondence, translation, and printing shall be shared by all the signatory Powers, and shall be recovered through the Foreign Office at Brussels.

§ III. Protection of Liberated Slaves

Article LXXXVI

The signatory Powers, having recognised the duty of protecting liberated slaves in their respective possessions, undertake to establish, if they should not already exist, in the ports of the zone determined by Article XXI., and in such parts of their said possessions as may be places for the capture, passage, and arrival of African slaves, as many offices or institutions as they may deem sufficient, the business of which will specially consist in freeing and protecting the slaves in accordance with the provisions of Articles VI., XVIII., LII., LXIII., and LXVI.

Article LXXXVII

Such offices, or the authorities charged with this service, shall deliver letters of freedom, and keep a register thereof. On receiving notice of an act of Slave Trade or of illegal detention, or at the instance of the slaves themselves, the said offices or authorities shall exercise all necessary diligence to ensure the liberation of the slaves and the punishment of the offenders. The delivery of letters of freedom should in no case be delayed if the slave be accused of a crime or offence against common law. But after the delivery of the said letters the ordinary legal procedure shall take its course.

Article LXXXVIII

The signatory Powers shall encourage the foundation in their possessions of establishments of refuge for women and of education for liberated children.

Article LXXXIX

Freed slaves shall always be able to resort to the offices to be protected in the enjoyment of their liberty. Whoever shall have used fraud or violence to deprive a liberated slave of his letters of freedom or of his liberty shall be considered as a slave-dealer.

CHAPTER VI

Restrictive Measures concerning the Traffic in Spirituous Liquors

Article XC

Justly anxious respecting the moral and material consequences which the abuse of spirituous liquors entails on the native populations, the signatory Powers have agreed to apply the provisions of Articles XCI., XCII., and XCIII. within a zone extending from the

20th degree north latitude to the 22nd degree south latitude, and bounded by the Atlantic Ocean on the west, and on the east by the Indian Ocean and its dependencies, comprising the islands adjacent to the shore up to 100 marine miles from the coast.

Article XCI

In the regions of this zone where it shall be ascertained that, either on account of religious belief or from other motives, the use of distilled liquors does not exist or has not been developed, the Powers shall prohibit their importation. The manufacture therein of distilled liquors shall equally be prohibited. Each Power shall determine the limits of the zone of prohibition of alcoholic liquors in its possessions or protectorates, and shall be bound to notify the limits thereof to the other Powers within the space of six months. The above prohibition can only be suspended in the case of limited quantities destined for the consumption of the non-native population, and imported under the system and conditions determined by each Government.

Article XCII

The Powers having possessions or exercising protectorates in the regions of the zone which are not placed under the system of prohibition, and into which spirituous liquors are at present either freely imported or pay an import duty of less than 15 fr. per hectolitre up to 50 degrees centigrade, undertake to levy on these spirituous liquors an import duty of 15 fr. per hectolitre up to 50 degrees centigrade for the three years next after the present General Act comes into force. At the expiration of this period the duty may be increased to 25 fr. for a fresh period of three years. At the end of the sixth year it shall be submitted to revision, taking as a basis the average results produced by these tariffs, for the purpose of then fixing, if possible, a minimum duty throughout the whole extent of the zone where the system of prohibition referred to in Article XCI. should not be in force. The Powers retain the right of maintaining and increasing the duties beyond the minimum fixed by the present Article in those regions where they already possess that right.

Article XCIII

Distilled liquors manufactured in the regions referred to in Article XCII., and intended for inland consumption, shall be subject to an excise duty.

This excise duty, the collection of which the Powers undertake to ensure as far as possible, shall not be lower than the minimum import duty fixed by Article XCII.

Article XCIV

The signatory Powers which have possessions in Africa contiguous to the zone specified in Article XC. undertake to adopt the necessary measures for preventing the introduction of spirituous liquors into the territories of the said zone across their inland frontiers.

Article XCV

The Powers shall communicate to each other, through the office at Brussels, and according to the terms of Chapter V., information relating to the traffic in spirituous liquors within their respective territories.

CHAPTER VII

FINAL PROVISIONS

Article XCVI

The present General Act repeals all contrary stipulations of conventions previously concluded between the signatory Powers.

Article XCVII

The signatory Powers, without prejudice to the stipulations contained in Articles XIV., XXIII., and XCII., reserve the right of introducing into the present General Act later on, and by common agreement, such modifications or improvements as experience may prove to be useful.

Article XCVIII

Powers who have not signed the present General Act shall be allowed to adhere to it. The signatory Powers reserve the right to impose the conditions which they may deem necessary on such adhesion. If no conditions should be stipulated, adhesion implies full acceptance of all the obligations and full admission to all the advantages stipulated by the present General Act. The Powers shall concert among themselves as to the steps to be taken to procure the adhesion of States whose co-operation may be necessary or useful in order to ensure the complete execution of the General Act. Adhesion shall be effected by a separate Act. It shall be notified through the Diplomatic channel to the Government of his Majesty the King of the Belgians, and by that Government to all the signatory and adherent States.

Article XCIX

[The Act has been ratified by the signatory Powers, April 2, 1892.]

A certified copy of this Protocol shall be forwarded to all the Powers interested.

Article C

The present General Act shall come into force in all the possessions of the contracting Powers on the sixtieth day after the date of the Protocol of Deposit provided for in the preceding Article.

Done at Brussels, the 2nd day of the month of July, 1890.

ANNEX TO ARTICLE XXXIX

License to Ply the Coasting Trade on the East Coast of Africa in conformity with Article XXXIX

Name of Vessel, with Description of Form of Build and Rig	Nationality	Tonnage	Port of Register	Name of Captain	Number of Crew	Maximum Number of Passengers	Limits within which Vessel is entitled to Ply	General Remarks

The present license must be renewed on the.....

Rank of Official who has issued the Permit:

DECLARATION OF JULY 2, 1890

The Powers assembled in Conference at Brussels, who have ratified the General Act of Berlin of February 26, 1885, or who have acceded thereto,

After having drawn up and signed in concert, in the General Act of this day, a collection of measures intended to put an end to the Negro Slave Trade by land as well as by sea, and to improve the moral and material conditions of existence of the native races;

Taking into consideration that the execution of the provisions which they have adopted with this object imposes on some of them

who have possessions or protectorates in the conventional basin of the Congo obligations which absolutely demand new resources to meet them,

Have agreed to make the following Declaration :—

The signatory or adhering Powers who have possessions or protectorates in the said conventional basin of the Congo are authorised, so far as they require any authority for the purpose, to establish therein duties upon imported goods, the scale of which shall not exceed a rate equivalent to 10 per cent. *ad valorem* at the port of entry, always excepting spirituous liquors, which are regulated by the provisions of Chapter VI. of the General Act of this day.

After the signature of the said General Act, negotiations shall be opened between the Powers who have ratified the General Act of Berlin or who have adhered to it, in order to draw up, within the maximum limit of 10 per cent. *ad valorem*, the conditions of the Customs system to be established in the conventional basin of the Congo.

Nevertheless it is understood—

1. That no differential treatment or transit duty shall be established;

2. That in applying the Customs system which may be agreed upon, each Power will undertake to simplify formalities as much as possible, and to facilitate trade operations ;

3. That the arrangement resulting from the proposed negotiations shall remain in force for fifteen years from the signature of the present Declaration.

At the expiration of this period, and failing a fresh agreement, the contracting Powers shall return to the conditions provided for by Article IV. of the General Act of Berlin, retaining the power of imposing duties up to a maximum of 10 per cent. upon goods imported into the conventional basin of the Congo.

The ratifications of the present Declaration shall be exchanged at the same time as those of the General Act of this day.

By Act of December 22, 1890, made at Brussels, Great Britain, Germany, and Italy, in accordance with the above Declaration, agreed to modify in the following manner, within the limits of the eastern zone of the conventional basin of the Congo, Article IV. of the General Act of the Berlin Conference of 1885 :—

'1. Great Britain, Germany, and Italy, in the territories under their influence situated in the eastern zone of the conventional basin of the Congo, and which are subject to Article IV. of the General Act of Berlin, shall have the right to levy duties on goods imported into such territories either by land or by water, in accordance with

the Customs regulations actually in force under the Treaties with Zanzibar, which provide for an import duty of 5 per cent. *ad valorem*.

'2. Arms and ammunition introduced in accordance with the special provisions of the General Act of Brussels may, however, be charged with an import duty not exceeding the rate of 10 per cent. *ad valorem*, provided that the Treaties containing contrary stipulations are modified, and that circumstances permit of it.

'3. The import duty to be levied on alcohols shall be regulated in accordance with the provisions of Chapter VI. of the General Act of Brussels.

'4. The following goods shall be admitted free of duty, viz.: agricultural machines and instruments, as well as all materials intended for the construction and maintenance of roads, tramways, and railways, and, generally speaking, all means of transport.

'5. The present Agreement shall come into force at the same time as the Acts signed at Brussels on July 2, 1890. It shall remain in force for a period of five years, and continue in operation for five more years, and so on for periods of five years, unless one or other of the three Powers demands its revision six months before the expiration of the quinquennial period.'

By Order in Council of Great Britain of May 9, 1892, the General Act is declared to be from April 2, 1892, an existing Slave Trade treaty within 36 and 37 Vict., c. 88.

It was resolved by the United States of America, as a part of the ratification, 'that the United States of America, having neither possessions nor protectorates in Africa, hereby disclaims any intention, in ratifying this Treaty, to indicate any interest whatsoever in the possessions or protectorates established or claimed on that continent by the other Powers, or any approval of the wisdom, expediency, or lawfulness thereof, and does not join in any expressions in the said General Act which might be construed as such a declaration or acknowledgment.'

Turkey interprets Article XXXIV. of the General Act in the sense that the inscriptions prescribed by that Article shall be made, in the case of Ottoman vessels, in Turkish characters and figures. Nevertheless it does not object to a translation in Latin characters being added to inscriptions in Turkish characters.

The President of the Republic of France, in his ratification of the General Act, has provisionally reserved, for an ulterior understanding, Articles XXI., XXII., and XXIII., and Articles XLII. to LXI.

It is understood that the Powers who have ratified the General Act in its entirety recognise that they are reciprocally bound to each other in regard to all of its Articles.

It is likewise understood that such Powers are only bound to the Power who has ratified partially, in the measure of the obligations undertaken by the latter Power.

Finally, it is well understood that, in regard to the Power who has ratified partially the matters to which Articles XLII. to LXI. relate shall continue, until an ulterior understanding be arrived at, to be governed by the stipulations and arrangements now in force.

RETURN SHOWING THE EARLIEST AGE AT WHICH MARRIAGE CAN BE LEGALLY SOLEMNISED IN EACH OF THE STATES OF EUROPE

[The following is abstracted from the information afforded by her Majesty's representatives abroad to the House of Commons in 1874. It is not improbable that some alterations may have occurred in the respective laws since that date.]

AUSTRIA

Persons who have not arrived at the age of puberty, viz. who have not completed their fourteenth year, are incapable of contracting a valid marriage. (Articles XXI. and XLVIII. of the Civil Code.) Minors who have not completed their twenty-fourth year, and majors who, for whatever reason, cannot contract of their own accord a valid obligation (as, for example, persons declared to be prodigals, &c.), cannot contract a marriage without the consent of their legitimate father, of their guardian, or trustee—in short, of the person called upon to exercise paternal authority over them. In default of a father, if he is dead or incapable of exercising parental authority, the law requires, besides the declaration of the guardian or trustee, the consent of the judicial authority whose province it is to watch over the interests of minors. Minors, being illegitimate, require, to establish the validity of a marriage, besides the consent of their guardian, the approval of the judicial authority. When a minor, who is a foreigner, wishes to marry in Austria, and is unable to produce the necessary consent of his father, guardian, or competent authority of his own country, the judicial authority of his domicile names a special trustee to examine into the circumstances of the minor, and to give or refuse accordingly his consent to the marriage. (Articles XXI., XLIX., L., and LI. of the Civil Code.) When the legitimate father, guardian, or trustee refuses his consent to the marriage of a minor, or of a female placed under guardianship, these latter can appeal to the decision of the competent judge. The judge examines the motives of the refusal, and subsequently confirms the refusal, or

authorises the marriage, according as he considers the motives legitimate or not. The law defines as legitimate motives for refusal the want of adequate means, bad moral character, proved or notorious, contagious diseases, and infirmities inconsistent with the objects of marriage. (Articles LII., LIII. of the Civil Code.) The military laws comprise some restrictions on the power of contracting marriage in the case of persons forming part of the active army. The transgression of these involves the nullity of the marriage. In some provinces the marriage of certain classes of persons depends furthermore upon the consent of the commune to which such persons belong. But this purely administrative restriction does not derogate from the personal power, and does not involve the nullity of the marriage in case of transgression. It only entails a disciplinary fine upon the public functionary who may have celebrated the marriage without the proper authorisation.

Belgium

A man before the age of eighteen years complete, and a woman before the age of fifteen years complete, cannot contract marriage in Belgium. (Article CXLIV. of the Civil Code.) Nevertheless it is lawful for the King to grant dispensations in the matter of age for grave reasons. (Article XIV. of the same Code.) The law of the 20th Prairial, year 11 (June 9, 1803), prescribes the formalities necessary for parties to obtain such dispensations.

Decree respecting the Grant of Dispensations relative to Marriage of the 20th Prairial, Year 11 (June 9, 1803)

See Articles CXLIV., CLVII., and CLXIII. of the First Book of the Civil Code.

Article I —Dispensations to marry before the age of eighteen years complete for men, and fifteen years complete for women, and dispensations to marry within the prohibited degrees, by Article CLXIII. of the First Book of the Civil Code, shall be granted by the Government on the report of the Grand Judge.

Article II.—The commissary of the Government attached to the Tribunal of First Instance of the arrondissement in which the petitioners propose to celebrate the marriage, when the question is one of a dispensation for the prohibited degrees, or the arrondissement in which the petitioner is domiciled, when the question is one of a dispensation in the matter of age, shall affix his opinion at the foot of the petition praying for such dispensation, and it shall then be brought before the Grand Judge.

Article III.—Dispensations for the second publication of banns, as mentioned in Article CLXIX. of the same Book of the Civil Code,

shall be granted, for reason good, in the name of the Government, by the commissary attached to the Tribunal of First Instance in the arrondissement in which the petitioners propose to celebrate their marriage ; and notice shall be given by such commissary to the Grand Judge, Minister of Justice, of the grave reasons which may have justified each of these dispensations.

ARTICLE IV.—The dispensation for a second publication of the banns shall be deposited in the secretary's office of the commune where the marriage is to be celebrated. The secretary shall make a copy of it, in which shall be notified its deposition, and which shall remain annexed to the certificate of celebration of the marriage.

ARTICLE V.—The decree of the Government granting a dispensation for age, or within the prohibited degrees, shall be prepared by the commissary of the Government, and, by an ordinance of the president, shall be registered in the records of the civil tribunal of the arrondissement in which the marriage is to be celebrated. A copy of this decree, in which mention shall be made of the registration, shall remain annexed to the certificate of celebration of the marriage.

ARTICLE VI.—The Grand Judge, Minister of Justice, is charged with the execution of the present decree, which shall be inserted in the 'Bulletin des Lois.'

DENMARK

In Denmark marriage can be legally contracted by a man at the age of twenty years, and by a woman at the age of sixteen years. The Minister of Justice, however, is authorised to grant dispensations from this law, but such dispensations are only granted in cases where the parties in question have attained an age approximate to that prescribed by the law, and on the declaration of a competent medical authority that they have attained sufficient maturity to qualify them for marriage. It is further necessary that exceptional circumstances shall be proved, which render it important and desirable for them to contract their marriage before the usual age.

FRANCE

Article CXLIV. of the Civil Code runs thus : 'A man may not marry until he has completed his eighteenth year ; a woman may not marry until she has completed her fifteenth year.'

Under the old monarchy boys could marry at the age of fourteen, and girls at twelve ; but when a marriage took place under such circumstances the husband and wife were usually separated until they had attained a more mature age. The fixing of the ages of fourteen and twelve was of Roman and even Athenian origin, but experience has taught that in the north both physical and intellectual qualities are less precocious than in the south, and so the law deferred the marriageable ages to eighteen and fifteeen in the cases of males and

females respectively. Had this been an absolute rule, objections might have arisen; the law, therefore, adds the following Article: Article CXLV. 'The Emperor may nevertheless, for sufficient reasons, grant a dispensation.'

The law has not defined these reasons; they are left to the absolute discretion of the Government, which decrees upon a report drawn up by the Minister of Justice, and this report is only drawn up after due enquiries have been made by the magistrates of the places inhabitated by the future husband and wife. Among the reasons usually alleged are pregnancy of the woman, necessity of giving satisfaction to the honour of a family, advantage of protecting young men from undesirable connections, &c. Petitions for these dispensations are, however, practically but of rare occurrence. Concerning marriage itself, as regards conditions, formalities, the consent of the couple to be married and of the relatives, protestations, prohibitions, petitions for the declaration of the invalidity of marriages, rights, duties, and obligations, &c., Articles CXLIV. and CCXX. of the Civil Code should be consulted; every case is distinctly provided for and explained.

[In 1880 the Registrar-General at Somerset House, London, instructed registrars of marriages that a notice of marriage between a British subject and a foreigner should not be given until it was understood that a marriage celebrated according to English law would be valid in the country of the foreigner, and that such foreigner had complied with the requirements of the marriage law of his country. It has frequently occurred that marriages duly solemnised in England have been declared invalid in France, and the English wife and family have been abandoned by the supposed husband. The Registrar-General has desired to impress on every British subject that an Englishwoman about to marry a foreigner does so at the great risk of such marriage being declared invalid. The French Embassy in London have prepared the following note on the subject:—

'A marriage contracted in England between a British subject and a French subject should be celebrated in the manner prescribed by the law of England. When it has been thus celebrated, the marriage is perfectly valid in France, provided that the French subject, at the time of celebration, has complied with the conditions prescribed by the law of France, and has fulfilled the obligations imposed by that law on a French subject who is about to marry.

'Epitomised as succinctly as possible, these conditions are as follows:—

'Firstly, the man must have completed his eighteenth year and the woman her fifteenth year, unless a special dispensation has been granted by the President of the Republic. Secondly, a man who has

not completed his twenty-fifth year, and a woman who has not completed her twenty-first year, cannot contract marriage without the consent of their father and mother; but in case of disagreement, the consent of the father suffices. If either of these two (the father or mother) is dead, or is prevented either by absence or legal incapacity from making known his or her will in the matter, the consent of the other suffices. If both the father and the mother are dead, or are prevented either by absence or legal incapacity from making known their will in the matter, the grandfathers and the grandmothers stand in their stead. If there is disagreement between the grandfather and the grandmother of the same line, the consent of the grandfather suffices. If there is disagreement between the two lines, such disagreement will carry consent. Persons who have attained their majority as before mentioned—namely, twenty-five years in the case of a man and twenty-one years in the case of a woman—are bound, before contracting marriage, to make formal and respectful application ("sommation respectueuse") for the consent of their father and mother, or that of their grandfathers and grandmothers when the father and mother are dead, or are prevented either by absence or legal incapacity from making known their will in the matter. When men are under thirty years of age and women are under twenty-five, this respectful application must be renewed on two other occasions, at intervals of a month; and one month after the third application the celebration of the marriage may take place. After the age of thirty years, the celebration may take place without consent, after a single respectful application and the lapse of one month. This respectful application must be made to the persons concerned by two notaries, or by one notary and two witnesses; and the reply must be stated in the *procès-verbal* relating to the matter. Thirdly, a marriage contracted in a foreign country (i.e. in a country other than France) between a French subject and a foreigner (i.e. one who is not a French subject) must be preceded by the "publications" (public notices) prescribed by Article LXIII. of the Civil Code. These "publications" (public notices) must be made at the last domicile of the French subject about to marry in England, and at the municipality of the domicile of his or her father and mother, or ancestors, under whose control he or she may be. The omission of these "publications" (public notices) is not now, in practice, regarded as a cause of nullity (of marriage); but it is, nevertheless, more prudent to conform to the law in this respect.

'A registrar or clergyman, celebrating in England a marriage between an English and a French subject, should, therefore, if he wishes to ensure that the marriage shall be unimpugnable in France, require from the French subject the production of documents proving that he has complied with the before-mentioned conditions and has

fulfilled the obligations specified above. These documents are the following :—(1) A certificate of birth ("acte de naissance"), to prove that the French subject is of the age required by the law of his country ; (2) an authentic document notifying the consent of the father and mother or the grandfathers and grandmothers, as the case may be, and in the absence of this document, when respectful applications ("sommations respectueuses") have been made, a copy of the "procès-verbaux" prepared by the notary when he made these applications, or, lastly, when the father and mother and the grandfather and grandmother are dead, certificates of their deaths ("actes de décès") ; (3) a certificate proving that the "publications" (public notices) above mentioned have been made. All these documents should be duly legalised (i.e. certified—verified) in such manner that there may be no doubt of their authenticity. In some cases it may be necessary that certificates of the deaths of several of the persons mentioned in the paragraph numbered 2 in the memorandum should be produced, as well as the consent of one or more of the survivors.'

The following memorandum was issued by the Home Office in 1881 :—

'*Memorandum as to French Marriage Law*

'This memorandum does not purport to give a full or exact account of the requirements of the French law on the subject, but has been prepared for the information of clergymen and others, in order to put them on their guard against difficulties which might not otherwise have been foreseen. Any person marrying a French subject, though with all the solemnities necessary for the validity of the marriage by the law of England, is liable to have the marriage set aside and treated as a nullity in the French courts, unless the conditions of the French law as to age, consent of parents or relatives, and public announcements before the solemnisation of the marriage have been complied with. It is therefore recommended to all British subjects proposing to intermarry with French subjects, that they should, before marrying, obtain the assistance of the nearest French consul (all French consuls being entitled to act as public notaries, &c.), to see that the conditions of the French law have been duly complied with, and to authenticate the evidence of such compliance by a public notarial act.[1]

'No Frenchman can marry (without a dispensation) under eighteen, and no Frenchwoman under fifteen.

[1] It should be remembered, however, that a notarial act is of no effect towards rendering an English or other marriage valid in France, in case the French law has not been complied with. The authentication of the consul does no more than certify that the document is authentic, not that the marriage is.

'No Frenchman under twenty-five, or Frenchwoman under twenty-one, can lawfully marry without the consent of his or her parents, or parent if only one. In case of difference between father and mother, the consent of the father is sufficient. If both parents are dead or incapable, the law requires the consent of the more remote ancestors (provision being made for the case of their disagreement), and, if there are none such living and capable, of a family council.

'After the ages above mentioned have been attained, the French law still requires a respectful communication of the intention to marry to be made to the relatives whose consent (under those ages) would be necessary; and it does not authorise a marriage to take place, if objected to by those relatives, until after a certain delay. The public announcement of the intended marriage of a Frenchman or Frenchwoman, required by the French law, must be twice made, with an interval of eight days between each publication, by the clerk of the registry of the place which is deemed by the French law to be the place of residence of such Frenchman or Frenchwoman, in his or her own country. The publication is to be made by a bill or placard, containing the necessary particulars, posted at the door of the town hall; and the marriage cannot lawfully take place until the third day after the second publication. The requirements as to age and consent (as well as those as to the degrees of consanguinity and affinity which bar marriage and which are substantially the same as in England) are enforced by the French courts with greater strictness than the rest; but even those as to respectful communications and publication before marriage in France (though the want of them may under some circumstances be excused) cannot safely be disregarded.']

GERMANY

The following were the laws of certain States of the Confederation in 1874:—

In Baden it appears that the earliest age at which the law allows men to marry is eighteen, and women fifteen. The consent of parents is necessary in the case of men until they have completed their twenty-fifth year; in that of women until they are twenty-one. In the event of parents refusing their consent, respectful summonses can be made by the children, and the law requires three such summonses from men who have not attained their thirtieth year, and women who are not twenty-five years of age, and two summonses only after that age.

There are (1874) in Bavaria four different sets of laws ruling the case. 1. In the district in which the Bavarian *Landrecht* prevails the lawful age for males is fourteen, for females twelve. 2. In the district in which the common law (*gemeines Recht*) prevails, the limits of age are the same as above. 3. In the districts of the Prussian *Landrecht*

the age for males is eighteen, for females fourteen. 4. In the districts of the French 'Code Civile' the age for males is eighteen, for females fifteen.

The then intended Law on Civil Marriage was to contain uniform rules on the subject for the whole of the Empire.

With reference to Hesse-Darmstadt, a Hessian law of May 19, 1852, required men to have completed their twenty-fifth year before they could be legally married, though a dispensation of age could be obtained on its being proved that there were legitimate grounds for asking it. When the North German Confederation law respecting marriages was passed in May 1868, the Hessian law was altered, and the age of twenty-one was fixed for men as the earliest age at which they could marry, a dispensation being granted when asked of the district officers by the family. It has been found that since the limit has been reduced from twenty-five to twenty-one, the number of marriages of men under twenty-five years of age has greatly increased. With regard to women the only obstacles to marriage at any age are those which parents and guardians can offer in the exercise of the private rights which they hold in such capacity (*Privatrecht*), as shown by the necessity for them to produce at all times the necessary consent. One-tenth of the Hessian men marry between the ages of twenty-five and forty-four, while only two per cent. marry before that time, and three-quarters per cent. after forty-five years of age. With women the case is very nearly the same, excepting, however, that the two first categories are more evenly balanced: five per cent. marry before they are twenty-five, and seven per cent. before they are forty-four, while only a quarter per cent. marry after forty-five years of age. In the case of marriages taken as a whole, nearly ten per cent. of the population marry before they are twenty-five, and twenty per cent. from that time upwards till the age of forty-five, when a marked disinclination to marriage becomes evident, and the numbers fall to a percentage of one per cent.

In Prussia, by the statute of December 21, 1872, it is provided that marriage can be legally solemnised (1) in the case of males on the completion of their eighteenth year; (2) in the case of females on the completion of their fourteenth year. No exceptions are allowed to these provisions.

In the Duchies of Saxe-Coburg and Gotha no male is permitted to marry before he has attained his twenty-first year. Cases occur when exceptions are made—namely, when the parents of a young man are, from illness or age, no longer capable of managing a farm or other business, and it becomes necessary that a wife should assist in the household. Such exceptions, however, can only be granted by the Government, to whom the petitioner must apply. As regards females, all that is necessary is, that at the age of fourteen years they

should be confirmed before leaving school. It seldom happens that a girl marries before her seventeenth year.

The legal age in Saxony for the marriage of males is eighteen years, for females sixteen years. According to the amended paragraph of the new German Civil Marriage Bill, the ages would be respectively twenty and sixteen years.

No Würtemberg subject, male or female, can be legally married unless of the full age of twenty-one years, without, first, the consent of parents, and second, in the case of males, without a special dispensation from the administrative authorities. This dispensation is granted only under exceptional circumstances, and the requirements of military service alone render it practically impossible in most cases for any man to marry before he is of age. The marriageable age for females is fixed by Würtemberg law at the completion of the fourteenth year, and under that age no marriage can be legally solemnised. The principle which underlies the provision of the law in regard to males is, that marriage is a contract which minors are legally incompetent to conclude, whereas females are supposed to acquire majority by marriage. The consent of parents is, in all cases, a necessary condition to the legal solemnisation of marriage, whether the parties are of age or not The exercise of this parental power, in the case of persons who have attained their majority, is controlled nevertheless by the right of appeal to the courts of justice, which have the right of deciding whether the consent is withheld on insufficient grounds, and in that case of dispensing with it. All those serving in the army, public functionaries of every grade (*Beamten*), clergymen, and schoolmasters, as long as they remain in the public service, require the permission of the authorities to enable them to marry. It is obvious that these restrictions, family and administrative, must operate (at the cost of individual freedom) as an effectual bar to early and improvident marriages.

Greece

1. According to Byzantine law, which on this head is still in force in the whole of Greece, with the exception of the Ionian Islands, men are forbidden to marry before they have accomplished their fourteenth year, and women before they have accomplished their twelfth year. ('Instit. Justin.,' 1, X. pr.; 1, XXII. pr. bas. XXXIII. 4, 3, &c.) The Canonical law of Greece coincides with this prohibition. (Zhishman, p. 263; Rhalles et Potles V. p. 35, 109.) 2. In the Ionian Islands, according to Article CXLI. of the Ionian Civil Code, men are forbiden to marry before they have accomplished their sixteenth year, and women before they have accomplished their fourteenth year. 3. According to Article CXXXII. of the draft of the

Hellenic Civil Code, which the Government of his Hellenic Majesty proposed to lay before the Chamber in 1874, men will be forbidden to marry before they have accomplished their fifteenth year, and women before they have accomplished their twelfth year.

HUNGARY

The Hungarian legislation makes a distinction between the matrimonial laws of different religions. The marriages of persons belonging to the Catholic or Oriental Churches (sacramental marriages) are regulated by Canonical law. Marriage contracts of other Christian or non-Christian persuasions are regulated by civil law. According to Canonical law the legal age for contracting marriage commences on the completion of the twelfth year for females, and on the completion of the fourteenth year for males. Marriages contracted even by minors having attained this legal age are valid. The consent of the legitimate father or his substitute (guardian, &c.) is a condition without which minors must not marry, and the priest who celebrates a marriage between minors without such consent is liable to a fine. But the marriage, once contracted, is not the less valid. The absence of paternal consent is not an invalidating obstacle. Marriages of Christians who do not belong to the Catholic or Oriental Churches, particularly those of Protestants of different persuasions, and marriages of persons who do not profess the Christian faith, are regulated by civil law. The civil law defines the age of infancy, that of adolescence (or of puberty), and that of majority. Infants, without distinction of sex, who have not completed their twelfth year are incapable of marrying. The 'legal age,' viz. that of puberty, commences in both sexes at the age of twelve years complete. Adolescents who have attained that age may contract marriage with the consent of the legitimate father, or in his absence of the paternal grandfather, or of the guardian, or of the pupillary authority; in short, with the consent of the person or authority who exercises paternal authority over them. The marriage of a minor contracted without such consent is null and void. This restriction ceases on attaining majority. Females attain majority on completing their sixteenth year, males on completing their twenty-fourth year. After this period persons of either sex can contract valid marriages without the consent of their fathers or guardians. Females who have attained the age of majority of sixteen years especially are entirely free in this respect, although they may remain under the paternal authority in regard to other matters; for according to Hungarian law females, even those who have attained the age of majority, remain under the direction of their father or legal guardian until their marriage. An unmarried female remains always a ward. A new law for abolishing

this restriction, and for conferring on females who have attained majority the right of managing their own affairs, is (1874) in prospect.

Italy

The earliest age at which marriage can be legally solemnised in the kingdom of Italy is (1) in the case of males eighteen years; and (2) in the case of females fifteen years, as determined by the fifty-fifth Article of the Civil Code.

The Netherlands

Article LXXXVI. of the Civil Code of the Netherlands prohibits the solemnisation of marriage below the age of eighteen in the case of males, and below the age of sixteen in the case of females; but his Majesty the King has power in urgent cases to license the solemnisation of marriage below the ages above specified.

Portugal

By Article MLXXIII., No. 4, of the Portuguese Civil Code, which was promulgated by the Law of July 1, 1867, and is now (1874) in force in Portugal and the adjacent islands, it is enacted that no males, if less than fourteen years of age, and no females, if less than twelve years of age, can legally contract marriage. Minors under twenty-one years of age cannot legally contract marriage without the consent of their parents or guardians.

Roumania

By the Roumanian Civil Code the earliest age at which marriage can be legally contracted in the United Principalities is in the case of males at eighteen years, in that of females at fifteen years. The sovereign alone has the power of granting exemption from the legal restrictions as to age in cases where serious cause is shown. Marriage emancipates a minor from control, but a curator is appointed for his affairs until he has attained the age of twenty-one.

Russia

According to the laws and regulations in force in the Russian Empire and the kingdom of Poland, men are forbidden to marry before the age of eighteen, and women before the age of sixteen. An exception to this regulation is made (1) in favour of the natives of the Caucasus, for whom the age at which marriage may be contracted is fixed for males at fifteen and for females at thirteen. (2) In special cases the bishop of the diocese may, on personal considerations, authorise the marriage if only six months are wanting

for the man or the woman to attain the age prescribed by the law. According to the regulations of the Grand Duchy of Finland, no marriage can be contracted without supreme authority before the age of twenty-one for males and fifteen for females, with the exception of peasants serving in the army, or those having any fixed trade or occupation, who are allowed to marry at the age of eighteen, and in Lapland at the age of seventeen.

Spain

By the marriage law of June 1870 the earliest age at which marriage can legally be solemnised in Spain is at fourteen years for males and at twelve years for females.

Sweden and Norway

According to Swedish law neither male nor female has the right to enter into a marriage contract before he shall have attained twenty-one years (age of maturity) and she fifteen years. The King, however, can grant an exception thereto. In Lapland, the most northern part of Sweden, it is permitted for men to marry so soon as they have obtained a requisite knowledge of the principles of the Christian religion and attained seventeen years of age. In Norway there is no decided age specified, yet it is permitted not only for males but for females to enter into the marriage state so soon as they have been confirmed (shown a sufficient knowledge of the Christian religion, and shall have partaken of the Lord's Supper). According to the Danish law, which in a great degree is still in force in Norway, the earliest age prescribed for marriage is, for men twenty years, and for females sixteen years.

Switzerland. (See next page.)

Turkey

There is no general law in Turkey regulating the age at which marriage may be contracted, but any marriage between parties who have attained maturity is considered lawful.

Anglo-Indian Marriages

In addition to the dangers to be incurred through want of legality of marriage in Europe, a new danger has arisen by the fact of European women marrying natives of India in England, or other European States. Every year natives of India come to Europe in large numbers to study medicine, law, &c., and many become engaged to be married to European girls, generally of the middle or lower classes. Were it possible for such couples to live in Europe after marriage, instead of in India, the girl's lot would be more

Cantons	Marriageable Age according to Law		Can a Dispensation as regards Age be obtained?	Consent of Relatives in the Direct Ascending Line is necessary until the Age of	Consent which is otherwise considered legally valid
	Men	Women			
	Years	Years		Years	
Zürich	20	16	Yes	24	
Berne	18	16	...	23 [18 years	
Lucerne	14	12	...	For men until 20 years, for women until	Council of State
Uri	14	12	...	For women until 25 years	
Schwyz	14	12	...		
Unterwalden-le-Haut	14	12	...		
Unterwalden-le-Bas	14	12	...	24	
Glaris	16	16	...		
Zoug	19	16	Yes	19	Guardians
Fribourg	18	16	...	20	
Soleure	18	16	Yes	21	
Bâle—ville	18	16	...	Until the death of the relatives; otherwise the consent of the guardian is necessary until 24 years of age	Tribunal of Morality
Bâle—campagne	20	18	Yes		
Schaffhouse	20	18	...	25	Law
Appenzell, Rh. Ext.	After confirmation, 16½ to 17 years		...		
Appenzell, Rh. Int.	20	16	Yes, on payment of a fee		
St. Gall	For Protestants, after confirmation; for Catholics, unknown		...		
Grisons	18	16	...	19	Law
Aargovie	20	17	Yes	24	
Thurgovie	20	17	Yes	20	Guardians
Tessin	20	16	...	25	Family council
Vaud	18	15	...	23	
Valais	14	12	...	23	
Neuchâtel	18	15	...	22 [years	
Geneva	18	15	...	For men until 25, for women until 21	Family council

Cantons in which the Canon Law obtains as regards marriage

Canon Law

Code Napoléon

bearable ; but in India after contracting such a marriage she is in all cases absolutely cut off from everyone of her own race, who detest and despise her as a social outcast. Her husband, if a Mohammedan, is permitted by his law to have four wives, and from the first she may find herself only one of two or three other wives. Nor is the fact of his becoming a Christian before marrying any safeguard, for he may change back again to suit his convenience. Hindoos are married at a very early age. It is a religious ceremony they must go through. A European wife, when she arrives in India, may therefore find that she is not in reality occupying the position of a wife in the European sense of that word.

THE FOREIGN MARRIAGE ACT, 1892
(55 & 56 Vict. Cap. 23)

AN ACT TO CONSOLIDATE ENACTMENTS RELATING TO THE MARRIAGE OF BRITISH SUBJECTS OUTSIDE THE UNITED KINGDOM. [JUNE 27, 1892]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

1. All marriages between parties of whom one at least is a British subject solemnised in the manner in this Act provided in any foreign country or place by or before a marriage officer within the meaning of this Act shall be as valid in law as if the same had been solemnised in the United Kingdom with a due observance of all forms required by law.

2. In every case of a marriage intended to be solemnised under this Act, one of the parties intending marriage shall sign a notice, stating the name, surname, profession, condition, and residence of each of the parties, and whether each of the parties is or is not a minor, and give the notice to the marriage officer within whose district both of the parties have had their residence not less than one week then next preceding, and the notice shall state that they have so resided.

3. (1) The marriage officer shall file every such notice, and keep it with the archives of his office, and shall also, on payment of the proper fee, forthwith enter in a book of notices to be kept by him for the purpose, and post up in some conspicuous place in his office, a true copy of every such notice, and shall keep the same so posted up during fourteen consecutive days before the marriage is solemnised under the notice.

(2) The said book and copy posted up shall be open at all reasonable times, without fee, to the inspection of any person.

4. (1) The like consent shall be required to a marriage under this Act as is required by law to marriages solemnised in England.

(2) Every person whose consent to a marriage is so required may, at any time before the solemnisation thereof under this Act, forbid it by writing the word 'Forbidden' opposite to the entry of the intended marriage in the book of notices, and by subscribing thereto his name and residence, and the character by reason of which he is authorised to forbid the marriage; and if a marriage is so forbidden the notice shall be void, and the intended marriage shall not be solemnised under that notice.

5. (1) Any person may on payment of the proper fee enter with the marriage officer a caveat, signed by him or on his behalf, and stating his residence and the ground of his objection against the solemnisation of the marriage of any person named therein, and thereupon the marriage of that person shall not be solemnised until either the marriage officer has examined into the matter of the caveat and is satisfied that it ought not to obstruct the solemnisation of the marriage, or the caveat is withdrawn by the person entering it.

(2) In a case of doubt the marriage officer may transmit a copy of the caveat, with such statement respecting it as he thinks fit, to a Secretary of State, who shall refer the same to the Registrar-General, and the Registrar-General shall give his decision thereon in writing to the Secretary of State, who shall communicate it to the marriage officer.

(3) If the marriage officer refuses to solemnise or to allow to be solemnised in his presence the marriage of any person requiring it to be solemnised, that person may appeal to a Secretary of State, who shall give the marriage officer his decision thereon.

(4) The marriage officer shall forthwith inform the parties of and shall conform to any decision given by the Registrar-General or Secretary of State.

6. Where a marriage is not solemnised within three months next after the latest of the following dates :—

(*a*) the date on which the notice for it has been given to and entered by the marriage officer under this Act, or

(*b*) if on a caveat being entered a statement has been transmitted to a Secretary of State, or if an appeal has been made to a Secretary of State, then the date of the receipt from the Secretary of State of a decision directing the marriage to be solemnised,

the notice shall be void, and the intended marriage shall not be solemnised under that notice.

7. Before a marriage is solemnised under this Act, each of the parties intending marriage shall appear before the marriage officer,

and make, and subscribe in a book kept by the officer for the purpose, an oath—

(*a*) that he or she believes that there is not any impediment to the marriage by reason of kindred or alliance, or otherwise; and

(*b*) that both of the parties have for three weeks immediately preceding had their usual residence within the district of the marriage officer; and

(*c*) where either of the parties, not being a widower or widow, is under the age of twenty-one years, that the consent of the persons whose consent to the marriage is required by law has been obtained thereto, or, as the case may be, that there is no person having authority to give such consent.

8. (1) After the expiration of fourteen days after the notice of an intended marriage has been entered under this Act, then, if no lawful impediment to the marriage is shown to the satisfaction of the marriage officer, and the marriage has not been forbidden in manner provided by this Act, the marriage may be solemnised under this Act.

(2) Every such marriage shall be solemnised at the official house of the marriage officer, with open doors, between the hours of eight in the forenoon and three in the afternoon, in the presence of two or more witnesses, and may be solemnised by another person in the presence of the marriage officer, according to the rites of the Church of England, or such other form and ceremony as the parties thereto see fit to adopt, or may, where the parties so desire, be solemnised by the marriage officer.

(3) Where such marriage is not solemnised according to the rites of the Church of England, then in some part of the ceremony, and in the presence of the marriage officer and witnesses, each of the parties shall declare—

'I solemnly declare, that I know not of any lawful impediment why I, *A. B.* (*or C. D.*), may not be joined in matrimony to *C. D.* (*or A. B.*)'

And each of the parties shall say to the other—

'I call upon these persons here present to witness, that I, *A. B.* (*or C. D.*), take thee, *C. D.* (*or A. B.*), to be my lawful wedded wife (*or* husband).'

9. (1) The marriage officer shall be entitled, for every marriage solemnised under this Act by him, or in his presence, to have from the parties married the proper fee.

(2) He shall forthwith register in duplicate every such marriage in two marriage register books, which shall be furnished to him from time to time for that purpose by the Registrar-General (through a Secretary of State), according to the form provided by law for the

registration of marriages in England, or as near to that form as the difference of the circumstances admits.

(3) The entry in each book of every such marriage shall be signed by the marriage officer, by the person solemnising the marriage, if other than the marriage officer, by both the parties married, and by two witnesses of the marriage.

(4) All such entries shall be made in regular order from the beginning to the end of each book, and the number of the entry in each duplicate shall be the same.

(5) The marriage officer by whom or in whose presence a marriage is solemnised under this Act may ask of the parties to be married the several particulars required to be registered touching the marriage.

10. (1) In January in every year every marriage officer shall make and send to a Secretary of State, to be transmitted by him to the Registrar-General, a copy, certified by him to be a true copy, of all the entries of marriages during the preceding year in the register book kept by him, and if there has been no such entry, a certificate of that fact; and every such copy shall be certified, and certificate given, under his hand and official seal.

(2) The marriage officer shall keep the duplicate marriage register books safely until they are filled, and then send one of them to a Secretary of State, to be transmitted by him to the Registrar-General.

11. (1) For the purposes of this Act the following officers shall be marriage officers, that is to say:

(*a*) Any officer authorised in that behalf by a Secretary of State by authority in writing under his hand (in this Act referred to as a marriage warrant); and

(*b*) Any officer who, under the marriage regulations hereinafter mentioned, is authorised to act as a marriage officer without any marriage warrant;

and the district of a marriage officer shall be the area within which the duties of his office are exercisable, or any such less area as is assigned by the marriage warrant or any other warrant of a Secretary of State, or is fixed by the marriage regulations.

(2) Any marriage warrant of a Secretary of State may authorise to be a marriage officer—

(*a*) a British ambassador residing in a foreign country to the government of which he is accredited, and also any officer prescribed as an officer for solemnising marriages in the official house of such ambassador;

(*b*) the holder of the office of British consul in any foreign country or place specified in the warrant; and

(*c*) a governor, high commissioner, resident, consular or other

officer, or any person appointed in pursuance of the marriage regulations to act in the place of a high commissioner or resident; and this Act shall apply with the prescribed modifications to a marriage by or before a governor, high commissioner, resident, or officer so authorised by the warrant, and in such application shall not be limited to places outside her Majesty's dominions.

(3) If a marriage warrant refers to the office without designating the name of any particular person holding the office, then, while the warrant is in force, the person for the time being holding or acting in such office shall be a marriage officer.

(4) A Secretary of State may, by warrant under his hand, vary or revoke any marriage warrant previously issued under this Act.

(5) Where a marriage officer has no seal of his office, any reference in this Act to the official seal shall be construed to refer to any seal ordinarily used by him, if authenticated by his signature with his official name and description.

12. A marriage under this Act may be solemnised on board one of her Majesty's ships on a foreign station, and with respect to such marriage—

(*a*) subject to the marriage regulations a marriage warrant of a Secretary of State may authorise the commanding officer of the ship to be a marriage officer;

(*b*) the provisions of this Act shall apply with the prescribed modifications.

13. (1) After a marriage has been solemnised under this Act it shall not be necessary, in support of the marriage, to give any proof of the residence for the time required by or in pursuance of this Act of either of the parties previous to the marriage, or of the consent of any person whose consent thereto is required by law, nor shall any evidence to prove the contrary be given in any legal proceeding touching the validity of the marriage.

(2) Where a marriage purports to have been solemnised and registered under this Act in the official house of a British ambassador or consul, or on board one of her Majesty's ships, it shall not be necessary, in support of the marriage, to give any proof of the authority of the marriage officer by or before whom the marriage was solemnised and registered, nor shall any evidence to prove his want of authority, whether by reason of his not being a duly authorised marriage officer or of any prohibitions or restrictions under the marriage regulations or otherwise, be given in any legal proceeding touching the validity of the marriage.

14. If a marriage is solemnised under this Act by means of any wilfully false notice signed, or oath made by either party to the marriage, as to any matter for which a notice, or oath, is by this Act required, the Attorney-General may sue for the forfeiture of all estate

and interest in any property in England accruing to the offending party by the marriage; and the proceedings thereupon, and the consequences thereof, shall be the same as are provided by law in the like case with regard to marriages solemnised in England according to the rites of the Church of England.

15. If a person—

(*a*) knowingly and wilfully makes a false oath or signs a false notice, under this Act, for the purpose of procuring a marriage, or

(*b*) forbids a marriage under this Act by falsely representing himself to be a person whose consent to the marriage is required by law, knowing such representation to be false,

such person shall suffer the penalties of perjury, and may be tried in any county in England and dealt with in the same manner in all respects as if the offence had been committed in that county.

16. (1) Any book, notice, or document directed by this Act to be kept by the marriage officer or in the archives of his office, shall be of such a public nature as to be admissible in evidence on its mere production from the custody of the officer.

(2) A certificate of a Secretary of State as to any house, office, chapel, or other place being, or being part of, the official house of a British ambassador or consul shall be conclusive.

17. All the provisions and penalties of the Marriage Registration Acts, relating to any registrar, or register of marriages or certified copies thereof, shall extend to every marriage officer, and to the registers of marriages under this Act, and to the certified copies thereof (so far as the same are applicable thereto), as if herein re-enacted and in terms made applicable to this Act, and as if every marriage officer were a registrar under the said Acts.

18. Subject to the marriage regulations, a British consul, or person authorised to act as British consul, on being satisfied by personal attendance that a marriage between parties, of whom one at least is a British subject, has been duly solemnised in a foreign country, in accordance with the local law of the country, and on payment of the proper fee, may register the marriage in accordance with the marriage regulations as having been so solemnised, and thereupon this Act shall apply as if the marriage had been registered in pursuance of this Act, except that nothing in this Act shall affect the validity of the marriage so solemnised.

19. A marriage officer shall not be required to solemnise a marriage, or to allow a marriage to be solemnised in his presence, if in his opinion the solemnisation thereof would be inconsistent with international law or the comity of nations;

Provided that any person requiring his marriage to be solemnised shall, if the officer refuses to solemnise it or allow it to be solemnised

in his presence, have the right of appeal to the Secretary of State given by this Act.

20. The proper fee under this Act shall be such fee as may for the time being be fixed under the Consular Salaries and Fees Act, 1891 ; and the fee so fixed as respects a consul shall be the fee which may be taken by any marriage officer ; and the provisions relating to the levying, application, and remission of and accounting for fees under that Act shall apply to the same when taken by any marriage officer who is not a consul.

21. (1) Her Majesty the Queen in Council may make regulations (in this Act referred to as the marriage regulations)—

(*a*) prohibiting or restricting the exercise by marriage officers of their powers under this Act in cases where the exercise of those powers appears to her Majesty to be inconsistent with international law or the comity of nations, or in places where sufficient facilities appear to her Majesty to exist without the exercise of those powers, for the solemnisation of marriages to which a British subject is a party ; and

(*b*) determining what offices, chapels, or other places are, for the purposes of marriages under this Act, to be deemed to be part of the official house or the office of a marriage officer ; and

(*c*) modifying in special cases or classes of cases the requirements of this Act as to residence and notice, so far as such modification appears to her Majesty to be consistent with the observance of due precautions against clandestine marriages ; and

(*d*) prescribing the forms to be used under this Act ; and

(*e*) adapting this Act to marriages on board one of her Majesty's ships ; and to marriages by or before a governor, high commissioner, resident, or other officer, and authorising the appointment of a person to act under this Act in the place of a high commissioner or resident ; and

(*f*) determining who is to be the marriage officer for the purpose of a marriage in the official house of a British ambassador, or on board one of her Majesty's ships, whether such officer is described in the regulations or named in pursuance thereof, and authorising such officer to act without any marriage warrant ; and

(*g*) determining the conditions under which and the mode in which marriages solemnised in accordance with the local law of a foreign country may be registered under this Act ; and

(*h*) making such provisions as seem necessary or proper for carrying into effect this Act or any marriage regulations ; and

(*i*) varying or revoking any marriage regulations previously made.

(2) All regulations purporting to be made in pursuance of this section may be made either generally or with reference to any particular case or class of cases, and shall be published under the authority of her Majesty's Stationery Office, and laid before both Houses of Parliament, and deemed to be within the powers of this Act, and shall while in force have effect as if enacted by this Act.

(3) Any marriage regulations which dispense for any reason, whether residence out of the district or otherwise, with the requirements of this Act as to residence and notice, may require, as a condition or consequence of the dispensation, the production of such notice, certificate, or document, and the taking of such oath, and may authorise the publication or grant of such notice, certificate, or document, and the charge of such fees as may be prescribed by the regulations ; and the provisions of this Act, including those enacting punishments with reference to any false notice or oath, shall apply as if the said notice, certificate, or document were a notice, and such oath were an oath, within the meaning of those provisions.

22 It is hereby declared that all marriages solemnised within the British lines by any chaplain or officer or other person officiating under the orders of the commanding officer of a British army serving abroad, shall be as valid in law as if the same had been solemnised within the United Kingdom, with a due observance of all forms required by law.

23. Nothing in this Act shall confirm or impair or in any wise affect the validity in law of any marriage solemnised beyond the seas, otherwise than as herein provided, and this Act shall not extend to the marriage of any of the Royal Family.

24. In this Act, unless the context otherwise requires—

The expression 'Registrar-General' means the Registrar-General of Births, Deaths, and Marriages in England ;

The expression 'Attorney-General' means her Majesty's Attorney-General, or if there is no such Attorney-General, or the Attorney-General is unable or incompetent to act, her Majesty's Solicitor-General, for England ;

The expression 'the Marriage Registration Acts' means the Act of the session of the sixth and seventh years of the reign of King William the Fourth, chapter eighty-six, entituled 'An Act for Registering Births, Deaths, and Marriages in England,' and the enactments amending the same ;

The expression 'official house of a marriage officer' means, subject to the provisions of any marriage regulations, the office at which the business of such officer is transacted, and the official house of residence of such officer, and, in the case of

any officer, who is an officer for solemnising marriages in the official house of an ambassador, means the official house of the ambassador ;

The expression 'consul' means a consul-general, consul, vice-consul, proconsul, or consular agent ;

The expression 'ambassador' includes a minister and a chargé d'affaires ;

The expression 'prescribed' means prescribed by marriage regulations under this Act.

25. This Act shall come into operation on the first day of January next after the passing thereof.

26. (1) The Acts specified in the schedule to this Act are hereby repealed to the extent in the third column of that schedule mentioned :

Provided that—

(*a*) any Order in Council in force under any Act so repealed shall continue in force as if made in pursuance of this Act ; and

(*b*) any proceedings taken with reference to a marriage, any register book kept, and any warrant issued in pursuance of the Acts hereby repealed, shall have effect as if taken, kept, and issued in pursuance of this Act ; and

(*c*) the fees which can be taken in pursuance of the Acts hereby repealed may continue to be taken in like manner as if fixed in pursuance of the Consular Salaries and Fees Act, 1891, and may be altered accordingly ; and

(*d*) the forms prescribed by or in pursuance of the Acts hereby repealed may continue to be used as if prescribed by an Order in Council under this Act.

(2) Every marriage in fact solemnised and registered by or before a British consul or other marriage officer in intended pursuance of any Act hereby repealed shall, notwithstanding such repeal or any defect in the authority of the consul or the solemnisation of the marriage elsewhere than at the consulate, be as valid as if the said Act had not been repealed, and the marriage had been solemnised at the consulate by or before a duly authorised consul :

Provided that this enactment shall not render valid any marriage declared invalid before the passing of this Act by any competent court, or render valid any marriage either of the parties to which has, before the passing of this Act, lawfully intermarried with any other person.

27. This Act may be cited as the Foreign Marriage Act, 1892.

Enactments Repealed

Session and Chapter	Title	Extent of Repeal
4 Geo. IV., c. 91.	An Act to Relieve His Majesty's Subjects from all doubt concerning the Validity of Certain Marriages Solemnised Abroad	The whole Act, so far as unrepealed
12 & 13 Vict., c. 68	The Consular Marriage Act, 1849	The whole Act
31 & 32 Vict., c. 61	The Consular Marriage Act, 1868	The whole Act
33 & 34 Vict., c. 14	The Naturalisation Act, 1870	In section 11 the words 'and of the marriages of persons married at any of her Majesty's embassies or legations'
53 & 54 Vict., c. 47	The Marriage Act, 1890	The whole Act
54 & 55 Vict., c. 74	The Foreign Marriage Act, 1891	The whole Act

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PRINTED BY
SPOTTISWOODE AND CO., NEW-STREET SQUARE
LONDON



